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A
SYSTEM
OF THE
SHIPPING AND NAVIGATION LAWS,
MARITIME CONTRACTS,
&c. &c.

BY F. L. HOLT, ESQ.

A SYSTEM OF THE Shipping and Navigation Laws OF GREAT BRITAIN: AND OF THE LAWS RELATIVE TO MERCHANT SHIPS AND SEAMEN; AND MARITIME CONTRACTS.

IN THREE PARTS:

I. OF THE SHIPPING AND NAVIGATION LAWS.
II. OF MERCHANT SHIPS AND SEAMEN.
III. OF MARITIME CONTRACTS.

TO WHICH IS ADDED,
AN APPENDIX OF ACTS OF PARLIAMENT, FORMS, &c.

BY FRANCIS LUDLOW HOLT,
OF THE MIDDLE TEMPLE, ESQ. BARRISTER AT LAW.

IN TWO VOLUMES.
VOL. I.

LONDON:
PRINTED FOR JOSEPH BUTTERWORTH AND SON,
LAW BOOKSELLERS, 43, FLEET-STREET;
AND JOHN COOKE, ORMOND QUAY, DUBLIN.

1820.

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PRINTED BY J. AND T. CLARKE, 38, ST. JOHN-SQUARE, LONDON.

12315 18 Jun 57

TO

THE RIGHT HON. SIR WILLIAM SCOTT, KNT.,

Judge of the High Court of Admiralty of England,

AND

A LORD OF TRADE AND PLANTATIONS,

&c. &c. &c.

SIR,

IN soliciting your protection to a Work on the Shipping and Navigation Laws of Great Britain, I consider myself as applying to one, whose administration of the more important of these laws, in the most critical period of our national existence, has so connected his name with these elements of our safety and greatness, as to have rendered the subject of the present Treatise almost peculiarly his own.

It is only a few years since this country concluded a war fertile beyond all others in the variety of its events; and which, whilst it continued, required a system of maritime jurisprudence peculiarly adapted to its new forms. The frequent resort to the Admiralty Court in cases connected with belligerent and neutral rights carried almost every British merchant before that tribunal; and as its jurisdiction comprehends the principal subjects relating to the Navigation and Shipping Laws, the experience of the wisdom and equity of this Court under your administration gradually attracted the most important cases within its compass. In the determination of all these cases, your decisions, Sir, and the principles upon which they proceeded, so united the equity of the Civil Courts with the necessary exactness and precision of the Common Law, that when any of your decrees, as sometimes happened, were afterwards incidentally brought before the Courts at Westminster, I know not a single instance in which they were disputed by the Judges; whilst I remember many, in which the late Lord Chief Justice of the King's Bench (a man whom we must all lament, and never more than in the present times,) expressed in his strongest language, and most characteristic manner, his warmest and entire concurrence in your decisions, and the principles which guided them.

To those who write in the English language, and upon a subject rather local, as respects the interests of their own country, it may appear an unreasonable expectation to indulge any hope of attention from learned foreigners. Upon this part of the subject, every future writer must acknowledge it as not the least portion of the obligations they owe to you, that your judgments have rendered the REPORTS of SIR CHRISTOPHER ROBINSON, a book in the library of every foreign lawyer; and have thereby given to the continent a knowledge and interest in subjects, which would otherwise have been confined to ourselves. Under this diffusion of the principles of our maritime law, it is no longer a vain hope that an English lawyer may be read abroad. In learning, in eloquence, in the condensation of strong sense in language exact and apposite, without quaintness and obscurity; in knowledge of the practices of life and character, in divesting subjects of all that is merely formal, technical, and artificial, and grounding them upon their proper and natural principles, and their due strength in right reason—your judgments, Sir, have done for your own country, what the writings of Grotius, Vinnius, and Montesquieu, have done for France, Holland, and Germany. And it will no longer be said, that England has not contributed her share both to the practical illustration of the law of nations, and to that general maritime law which, under the name of the Law Merchant, is no less the law of single countries, than the public mercantile code of Europe.

The above, Sir, are the public reasons for addressing this Treatise to you; and I beg leave to add, that if I had known nothing more of SIR WILLIAM SCOTT than his public reputation, and had seen nothing of him but in his judgments, I should still have taken the liberty to introduce this Work to the profession by the aid of his distinguished name. It is no small pride to me, Sir, that in this respect private feelings concur with public duty, and that this opportunity is afforded me of expressing my gratitude for a friendship and consideration, which I need not be told that I owe more to your kindness than to any merits of my own.

I have the honour to remain,

Sir,

With the highest respect,

Your most obliged,

and obedient Servant,

FRANCIS LUDLOW HOLT.

Paper Buildings, Temple,
Jan. 20, 1820.

PREFACE.

THE reader will observe that the present Treatise is divided into three parts. The first part treats of the Shipping and Navigation Laws; in other words, of that system by which the maritime trade and commerce of the country are regulated, and which has become of the first importance to the professional lawyer and the merchant, since the general peace has restored these laws to their ordinary operation, and removed the unnatural state which the necessities of the late war had induced.

The First Part is divided into eight Chapters,—1. On the Origin and Policy of the Laws of Shipping and Navigation, &c.—2. Of the Plantation or Colonial Trade.—3. Of the Trade with Asia, Africa, and America, not being Colonial, &c.—4. Of the European Trade.—5. Of the Coasting Trade.—6. The Fisheries.—7. The Registry Acts.—8. Of Seizures and Forfeitures for the breach of the Navigation Laws, Registry Acts, &c.

In discussing these subjects respectively, the Author has first considered the several acts of Parliament by which they are regulated; he has then passed to the cases and decisions to which they have given rise; and concluded with a summary of RULES and EXCEPTIONS for the guidance of the reader through the labyrinth of statutes on which the Navigation Laws depend. In this Treatise the Author has omitted every thing not strictly connected with his subject. Custom-house regulations, duties, drawbacks, and all the general details of trade, are not noticed, except incidentally, and very briefly, as they are not comprehended within the plan of the present Work. It became necessary, however, in the Chapter on the trade with Asia, Africa, and America, to consider the constitution of the several trading companies now existing, and more particularly that of the East India Company. In this Chapter likewise a short account of the American Navigation Laws was deemed necessary, and a compendium of the Acts of Parliament and Treaties for abolishing the Slave Trade. In the Chapter on the European trade the late war-system of our commerce was of necessity to be examined, and a brief review of our commercial relations with other countries was thought expedient. But the Author has dispatched these subjects with as much brevity as was consistent with clearness and utility; insisting upon nothing but what is necessary to the practical lawyer and merchant, and what may operate in cases brought before our own courts of law.

The Chapter on the Registry Acts will perhaps be deemed disproportionately long; but the great importance of the subject, and the variety of the cases, rendered it necessary to go into detail, even to minuteness, on a subject upon which the property of shipping and the security of transfers so essentially depend. The Chapter on Penalties and Forfeitures has been annexed on account of the importance of the subject matter.

The second part of this Treatise, in which is discussed the law of Merchant Ships and Seamen, consists of seven Chapters. In this Part every subject is examined relating to owners, part-owners, and the title and interest in British shipping;—the qualifications and duties of masters, seamen, pilots, &c.; of the power and authority of the master; of hypothecation, bottomry, and respondentia; and the sale of ship or cargo in cases of necessity. This Part treats likewise very fully of seamen's wages; of the manner of earning them; of the forfeiture of wages, and of suing for and recovering them. The several acts for the regulations of pilots and convoys are likewise treated in their order; and the cases and decisions, respecting Merchant Ships and Seamen, together with the acts of Parliament, are brought down to the time of the publication of this Treatise.

The Third Part treats of Maritime Contracts generally, with the exception of those which relate to marine insurance. It treats of charter-parties; demurrage; bills of lading; of the duties of freighters, ship-owners, and masters; of exceptions to the liabilities of owners under charter-parties; of the common law extent of their responsibility; and of the latitude given to their specific exemptions under the clause of exceptions of sea-perils, &c. It then passes to freight, general average, stoppage *in transitu*, and salvage. Under each of these heads are respectively considered those principles and distinctions, in one or the other of which all the cases must fall. As far as the Author's labour and industry could succeed in accomplishing his purpose, he can undertake, he hopes without presumption, to assert, that he has omitted no case whatever of any importance in the Admiralty or common law courts.

As the subject of the present Treatise, however laboriously and minutely it may be explained, is, in many parts, remote from general apprehension, and perhaps not very alluring as respects popular interest and curiosity, the Author has prefixed an INTRODUCTION, for the purpose of exhibiting a more brief and intelligible synopsis both of the reason and policy of the general system of our Shipping and Navigation Laws, and of those main and leading principles upon which the decisions of the courts have proceeded, in almost all the cases comprehended under the second and third parts of this Treatise. As respects this object, the proper character of the Introduction is, that it is the connected exposition and arrangement of the principles of the law of shipping and maritime contracts, disembarrassed from the cases; and if the Writer have in any tolerable degree effected his purpose in this part of his Work, the reader will possibly find a great body of law condensed into a small compass. It is trusted that the Tables and Indexes will be found useful to the profession. The Appendix consists of four parts; and contains,—1. The Statutes relating to the Navigation Laws.—2. The Statutes relating to Merchant Ships, Pilots, and Seamen's Wages, &c.—3. The Acts of Parliament relatlating to Salvage and Maritime Contracts generally; and, 4. Forms, Commercial Precedents, &c.

On account of the changes which our colonial and foreign trade is constantly undergoing, the Author was obliged to omit some regulations in their proper places, which, though introduced into Parliament, had not become established laws whilst the first part of this Work was in the press. The substance of these acts, passed in the fifty-ninth of his present Majesty, many of which are of great importance, will be found at the conclusion of the Second Volume. The new, or rather the extended treaty of commerce with America, and the enlargement of the Bermuda import and export trade, are the principal subject matter of these acts.

On account of the complexity of the subject, there is a separate Index to the Navigation Laws.

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INTRODUCTION

TO THE

LAW OF SHIPPING AND NAVIGATION.

Introduction to the Law of Shipping and Navigation.

IT will, perhaps, be readily admitted that, with the single exception of the soil, ships are the noblest property which any country can possess, being machines of national defence as well as instruments of wealth to individuals. It is from these considerations that this species of property has always been taken under the special protection of the law; and adopted, not less as a material of naval power, than of commercial prosperity.

The comparative greatness of the British Empire is not indeed imputable to one cause only. A very considerable portion of it belongs to a system of religion which, on the one hand, is reformed from the superstitions of the Romish church; whilst, on the other, it maintains all those essentials of doctrine which are adapted beyond all others to the happiness of individuals and nations. Another portion belongs to our laws and constitution, in the liberty and protection of which every man finds equal encouragement in

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acquiring as security in possessing. Another portion belongs likewise to our national habits and character; and perhaps, in no inconsiderable degree, to that hereditary opinion of superiority with which the meanest amongst us regards himself as a subject of the British empire. But the combined effect of all these causes is completed and crowned by our system of commerce; and more especially by those laws which regulate our trade and industry, with a view of rendering them concurrent instruments of our national power.

It is totally unnecessary to remind the living advocates of this system, as it would have been equally presumptuous to have reminded the illustrious founders of it, that the first principle of commerce is a perfect freedom of trade; that in almost all cases it should be left to make and find its own way; and that the best boon which legislators can bestow upon it, is to leave it unrestrained. The framers of the Regulation System, and those who have so ably maintained their doctrines in the present day, have as large, and certainly as just, a comprehension of the nature of commerce, as those who have risen up in opposition to their principles. But they thought, and if we may judge from the effect, they thought justly, that nations as well as individuals had other and greater interests than mere present wealth; that the first concerns of a great empire were its safety, its glory, and its national character; and that, in comparison with these pursuits, commercial wealth was a subordinate object; or at least that it derived its best value as means to those more important ends.

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Under this consideration, they deemed it an enlarged prudence to tax our commerce for the sake of our public defence. They were aware that we might become richer under an unrestrained trade than through a commerce however wisely regulated; but, as these regulations gave us a greater value in national defence than what they subtracted from our immediate wealth, they conceived that they only sacrificed a less interest in pursuit of a greater. Hence our commerce has not been ignorantly yielded up to our navigation. Our Regulation System has not been adopted, as some have falsely asserted, as the means of advancing our commerce, but of maintaining and supplying the growth of our navy. And the effect has been what, according to the experience of all nations, has always been the result of a large and generous prudence. Our navy, which was at first supported at the expence of our trade, and, in fact, rose altogether out of its restrictions, has now liberally paid back the aid which it borrowed; and by conquering so large a portion of the most fertile part of the globe into the sphere of our commerce, and by holding together the numerous members and remote dependencies of the British empire, has given us a market which mere commerce of itself could never have acquired. In this manner have our commercial greatness, and our naval power, become intermixed as reciprocal means and ends. Without our navy, in the present state of the world, and amidst the jealousy of so many rival nations, it would be absurd to indulge a momentary expectation that our commerce could either attain the eminence it possesses, or could long support itself in that superiority.

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And, without the sources of our commercial wealth, it would be manifestly impossible that the country could support the concurrent burthen of a great military and naval establishment. So impolitic must be every attempt to sever those interests, and so unwise every view which regards them as independent and adverse; because each is in a degree supported by a contribution from the other.

Whatever limits a large expatiating principle is necessarily a subtraction from its immediate beneficial operation. But such principle is only adverse where it takes more than it gives; where it imposes restrictions without any return of a greater, or at least equal good. But this is not the relation of our commerce and Regulation System. What it takes in restriction, it gives back in protection. What it takes in increased freight, (if, indeed, the effect of our Navigation Law does increase our freight,) it repays by enlarging the sphere of the supply of raw materials, and that of the market for manufactured goods; by opening India and China to our shipping and industry, and by maintaining and superintending the liberty of the intercourse of nations throughout the world. Without our navy, would our West India islands supply the colonial consumption of America, as British colonies, or as American appendages? Without our commerce, could we have supported such a contest, as that but recently determined, for the common liberty of the continent and ourselves?

But, in the following Treatise on the Laws of

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Shipping and Navigation, it has occasionally become part of our duty to consider these questions as they arise; and, therefore, we shall here pass onwards to the more immediate subject matter of the present observations.

Division of our Navigation System.

The object of our Navigation System is to promote the increase of British shipping by securing the demand and employment of it.—Its means, to this end, may be distributed under the respective heads;—the Colonial Trade; the trade beyond Europe not being Colonial; the European Trade; the Coasting Trade; the Fisheries; and the Regulations for ascertaining the ownership and built of English ships; or, in other words, the Registry Acts. (*a*)

So long as the interests of our Naval strength required a rigid adherence to this system, and so long as our commerce, from its actual character, did not suffer a greater loss from these regulations than the enforcement of them imparted good to our navy, our Navigation System was inflexibly enforced; and the objections of our merchants were answered with the just observation, that as our agriculture itself paid to our revenue, so our commerce and manufactures must contribute to our national defence; and that it was better to possess a less extensive commerce, and a perfect national defence, than a greater trade, and a less effective navy. But when the gradual consequences of this restrictive system had raised our navy to a degree of strength adequate to our relation with

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(*a*) See Chapter I. on the origin and policy of the Navigation laws, and Chapter II., *in initio*, p. 22.

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other nations, and the Navigation Laws had thus in a good degree accomplished their object, the government and legislature then availed themselves of the opportunity of making some concessions in favour of commerce. It is under this change of circumstances, that our Navigation System has been from time to time relaxed and opened in favour of general trade. In the first partof the following Treatise, in which the Navigation Laws are stated and discussed, we have pointed out the several changes and modifications which the system has undergone in all its branches, and have endeavoured to assign the reasons on which such alterations have proceeded. (*b*) But, as the character of the body of our Work is too strictly legal to admit of any enlarged discussion of the political principles of the modifications of our Navigation System, our present purpose is to take a review of these gradual changes, and of that state of commercial and political relations under which they have originated.—In executing this enquiry, it will be indeed necessary to take a view of our Navigation System as a whole, as the reason of the exceptions cannot be adequately understood without a deliberate attention to the nature and effects of the rule. But the Navigation system, as respects the popular knowledge of it, appears to be still so imperfectly comprehended by many of the writers of the day, that it

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(*b*) See the first seven Chapters, composing Part I.—1. On the Origin and Policy of the Navigation Laws; 2. On the Plantation or Colonial Trade; 3. Of the Trade with Asia, Africa, and America, not being Colonial; 4. Of the European Trade; 5. On the Coasting Trade; 6. On the Fisheries; 7. On the Registry Acts.

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will certainly not be without utility to explain the heads and substance of the system as separated from the numerous acts of parliament in which it is contained. It may be allowed, perhaps, to express a wish, that the multiplicity of acts of parliament which now compose our Navigation system, and many of which repeal only parts of preceding acts, and thus leave the old act and the new statute in existence at the same time, were all consolidated into a few leading acts, and thus rendered more simple and intelligible to practical men. But this observation must not be extended to the Registry acts, the simplicity, efficacy, and the legal precision of which, still remain an eminent example of the talents of the nobleman to whom the country is chiefly indebted for this great buttress of our naval strength.

Colonial trade.

The *first* branch of our Navigation System respects the Colonial Trade; and this trade was anciently regulated by the following rules:—I. That no goods or commodities should be imported into, or exported from, any colony in Asia, Africa, or America, belonging to Great Britain, but in British built ships, owned by British subjects, and navigated by a master, and three-fourths at least of the mariners, British subjects.—7 & 8 Will. III. *c.* 22.

The Navigation Act originally confined this trade to ships *belonging* to the people of England, &c. or, allowing an alternative, to ships of the *built* of the plantations. But the stat. of 7 & 8 Will. requires all ships employed in the plantation trade to be of the *built* of England and Ireland, or of the colonies and

Colonial trade.

plantations, with the like conditions as to the property and navigation as are prescribed by the 12 Car. 2. c. 18.

The *second* rule was framed with the design of securing to the mother country the principal articles of colonial growth; and enacts, II.—That no sugar, tobacco, &c, (*c*) of the growth or production of any British plantation, in Asia, Africa, or America, shall be exported to any place whatsoever, other than to some British plantation, or to Great Britain, or Ireland.

By these regulations, the Navigation act accomplished the two important objects:—the first was, the exclusive monopoly of our colonial trade by British shipping; and, secondly, the exclusive transmission, either to a British plantation, or British port, of all the staple articles which were of the growth and production of the colonies.

The *third* rule was established by a subsequent act, 15 Car. II. c. 17. and is no less comprehensive in its object of securing the monopoly of the colonial market, by limiting the importation of all supplies to Great Britain exclusively. This rule enacts, III.—That no goods or commodities of the growth, produce, or manufacture of Europe, shall be imported into any land, island, plantation, colony, &c. belonging to, or in the possession of Great Britain, in Asia, Africa, or America, but such as shall be shipped in Great Britain, or

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(*c*) The articles contained in this rule are called *enumerated* goods. See *post*, page 62, where they are enumerated.

Colonial trade.

Ireland, in English built shipping, &c.; and no vessel shall clear out from Great Britain, except the whole cargo be there laden and shipped *bonâ fide*, and without fraud. (*d*)

The above three rules are to be regarded as the fundamental principles of our colonial trade under the Navigation System. It belongs to another part of this Work to shew the various qualifications to which they have been subjected, and by which the system of monopoly has been accommodated, as well to the equitable circumstances of the colonists themselves, as to the great political changes which have occurred since the origin of these laws. We shall here dwell only upon those important features in the new system, in which the relaxation has arisen from circumstances that could not have been within the foresight of the framers of the Navigation act.

The relaxation of the first and principal rule of the Navigation act, as respects our colonial monopoly, was by the opening of free ports in the principal islands of the West Indies, and the permission to colonies, under the dominion of foreign European states, to import certain enumerated articles in ships of their own built, and to export plantation commodities in return.

Of Free ports.

It had always been the policy of this country, since the passing of the Navigation act, to connive at the trade between the continent of South America and the West India islands; the value and produce of that trade

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(*b*) 22 & 23 Car. 2. c. 26. admitted Ireland into this trade with the colonies.

Colonial trade.

being very considerable, and tending greatly to advance the growth of our colonies. With this purpose orders in council were issued soon after the passing of the Navigation act, which expressly directed that Spanish ships should be allowed to import into our colonies particular articles of commerce, notwithstanding the prohibitions of the statute 12 Car. 2. This system of connivance was continued till the reign of his present majesty; (*e*) at which time it was justly considered, that this dispensing power of orders of Council was in itself irregular and objectionable, and that it would be a better principle to alter the law according to the necessity of the case. Under this consideration, it was resolved to open certain ports in the West Indies for the more free importation and exportation of goods; but subject to such restrictions and limitations, as might restrain the indulgence granted within its object. The establishment of *free ports* originated in this policy; the statutes by which they were instituted enacting, that a variety of articles therein enumerated might be imported into certain ports in the West Indies from colonies under the dominion of foreign *European* sovereigns or states, and in ships owned and navigated by the inhabitants of such co-

Of Free ports.

(*e*) The 6 Geo. III. c. 49. was the first free port act. This act was enlarged in some of its provisions, and altered in others, by 14 Geo. III. c. 41, and by 21 Geo. III. c. 29. But these acts were repealed by 27 Geo. III., which contains nearly the whole of the present law and regulations of free-ports. The most important alteration in the free-port acts has been, the taking off the restriction which confined this trade to vessels of only one deck, and permitting it to be carried on by ships of any tonnage. See *post.* Part I. c. 2. p. 51. and rules and exceptions, p. 61.

lonies: and that certain particular commodities might be also exported in such vessels.

Colonial trade.

The existing exception, therefore, to the first rule under this head is, that wool, cotton, indigo, cochineal, drugs, and dyeing woods, (and almost all articles of colonial produce, except sugar and coffee,) being the growth of any colony or plantation in America, belonging to any foreign *European* state, may be imported from any such colony into any of the free ports, and in vessels *built and owned* by such foreign colonists. And into certain ports named in the act (*f*) the sugar and coffee of such foreign colonies may likewise be imported. And, in return, all such vessels of foreign colonies may export from such free ports *rum*, the produce of any British island, and all manner of goods, which shall have been previously legally imported into the same islands, certain naval stores only excepted.

Of Free ports.

The second exception to the colonial monopoly under the Navigation act attaches to the rule under that statute, by which it is provided, that no sugar, &c. shall be *exported*, except to England or Ireland, and in British ships. The latter acts for the establishment of free ports, and for the enlargement of the system, have selected certain ports in some central colony, the principal of which are St. Georges and Hamilton in Bermuda, to which the surrounding colonies may export their growth and produce as a general depot: and whence they may sell it to all

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(*f*) 27 Geo. III.

Colonial trade.

foreigners, who may convey it away in ships of their own built, ownership, and manning. (g)

In the early state of our colonies, the monopoly of the mother country was very little felt. The demand of the home-market was infinitely greater than the imperfect cultivation of infant colonies could supply.—Hence colonial produce procured as high a price as the colonists could desire; a larger market was not required for their exports.—As little was it necessary to supply the limited wants of new colonies. Under these circumstances, the double monopoly of the mother country, that of exports and imports, was in fact of little consequence to the colonies themselves. As far as respected every colonial interest, the effect of the colonial part of the Navigation System was almost a matter of indifference, whilst the monopoly in a degree at least advanced and maintained the great public concern of our naval strength. Under this state of things the government and legislature wisely adhered to a system, which contributed to the growth of our marine, whilst it impaired no visible good of our plantations.

But when the progress of our own colonies, and, still more particularly, the growth of all foreign colonies in the same seas, augmented the quantity of colonial produce beyond what was merely sufficient for the home supply; and when a competition arose between our own islands and those of foreigners to

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(g) 52 Geo. III. c. 79.; 53 Geo. III. c. 50.; 57 Geo. III. c. 28.—See likewise Rules and Regulations, Part I. c. 2. p. 62.

Colonial trade.

supply the markets of Europe and the United States; another policy became manifestly necessary. Our colonial planters could not enter into competition on equal grounds with foreigners, so long as their produce was to be sent first to England, and thereby burthened with the double freight of a voyage to Europe, and thence perhaps to the United States. Such a restriction necessarily pressed heavy upon our planters. The more perfect cultivation of the islands, and their larger produce in consequence, gave, indeed, to these planters something of the character and consideration of British agriculturists; and their condition under this increase was, that their produce was greater than they could sell within the home market. It was, therefore, necessary for them to have an access to a foreign market, but from which they were restrained by the existing monopoly. In order to meet and remove this evil, the system of special free ports was adopted. (*h*) By the effect of this system, our colonies are now enabled to supply the large demand of the American markets, and to maintain on more equal terms a competition with the colonists of France and Spain. On the other hand, in order to guard the fundamental principles of the Navigation System, and strictly to retain the licence within the degree which the wisdom of the state has fixed, this relaxation of the colonial system, both as to the general free ports, as well as to the special

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(*h*) The 27 Geo. III. first constituted the port of Nassau in the island of Providence, certain ports in the Bahama islands, and the principal port of the island of Bermuda, Special Free-ports for the importation of foreign sugar and coffee. See Part I. c. 2. p. 52.

Colonial trade.

free ports, in favour of the present state of the colonies, is confined to certain ports only, to the end that government and its officers may always have its attention upon them. By the operation of the indulgence granted, the just claims of the colonists, and the interests of our general commerce, are maintained and encouraged. By the effect of the restriction, so much of the ancient preference is retained, as is consistent with new circumstances. This introduction of free ports in our colonies is the first and main exception to the exclusive system of the Navigation act.

Under this exception, sugar, coffee, rum, and molasses, the produce of any British colony in the West Indies, imported into Bermuda in any British ship, may be exported from certain ports in that island, to the territories of the United States, in any *foreign* ship belonging to any country in amity with his majesty, above the burthen of sixty tons. (*i*) And tobacco, lumber, &c, of the growth and production of the United States, legally imported into Bermuda, may be exported thence to the West Indies, in British built ships. (*k*)

It is another relaxation of this rule, in favour of

(*i*) 52 Geo. III. c. 79. 53 Geo. III. c. 50. 57 Geo. III. c. 28.

(*k*) See Part I. c. 2. p. 62. By 27 Geo. III. the General Free Port Act, as before stated, sugar and coffee, the produce of *foreign* colonies, only could be imported into the Bahamas and Bermuda; but by the 52 Geo. III. c. 79. the sugar and coffee of *our own* colonies, imported into Bermuda in British ships, may be exported to the United States in any *foreign* vessels, &c.

Colonial trade.

the ceded colonies, that the Dutch proprietors in Demerara, Berbice, and Essequibo, are permitted to export the produce of their estates direct to the Netherlands, in ships the property of the subjects of the king of the Netherlands, wherever built, and without any restriction as to the mariners navigating the same, for the space of five years, commencing the 1st of January, 1816. But, after the expiration of five years, no such trade is to be carried on, except in ships Dutch-built, and navigated by Dutch subjects.

Another relaxation from the second rule of our Navigation Laws was produced by the circumstances of the American colonies becoming independent states; whereupon it seemed necessary to allow a limited intercourse between those States and the West Indies. The produce, therefore, of the sugar islands, with some few exceptions, is permitted to be exported direct to the United States: but this trade must be carried on in British-built ships, owned and navigated according to law. (*l*)

Another important exception to this rule of the colonial exports being confined to the mother country is, that sugar, coffee, rum, and other articles of colonial produce, may be exported direct from the British West India islands to Malta and Gibraltar; but still with the same restriction of the trade to ships British-built, and owned. (*m*)

(*l*) See *post.* p. 39. and Rule 2nd; Exception 2nd, Part I. c. 2. p. 63.

(*m*) 55 Geo. III. c. 29. 57 Geo. III. c. 4.

Colonial trade.

The next exception is in favour of the general intercourse of the colonies with each other; and so far opens the ancient rigid exclusion of the colonial system, as to permit British ships to export any goods, of the manufacture of Europe, from one British colony to another; as also any goods which shall have been legally imported by virtue of the free port acts. (*n*)

The third rule, of our colonial trade under the Navigation act is, that no European article shall be imported into any British colony, unless shipped in Great Britain or Ireland, and in British-built vessels.

The first principal exception to this rule is in favour of what is termed the lumber trade. The act of the 28 Geo. III. in order to assist the cultivation of the colonies, permits British-built ships to import from the United States articles of the first necessity into the West India islands, such as pitch, tar, hemp, staves, timber, sheep, hogs, live stock of any sort, bread grain, flour. (*o*)

Another exception is, in favour of our fisheries in Newfoundland, Nova Scotia, and Quebec. Salt may be laden in any port of Europe for the fisheries in these plantations. And the wines and fruits of the Madeiras and Azores may be shipped from thence for any of the British states in North America.

(*n*) See colonial trade, Rule 3, p. 64.

(*o*) See colonial trade, Rule 5, p. 66.

Fruit and wines from Malta and Gibraltar may likewise be imported direct to the sugar colonies, or plantations in America, Newfoundland, or Bermuda. (*p*)

Colonial trade.

Another exception provides for the wants of the colonies upon any occasional interruption of the good understanding between Great Britain and America. In an ordinary state of things, the planters can always receive their supply of lumber, live stock, bread, &c. from the United States. But, in case of hostility between England and America, the colonies might suffer much distress from the interruption of this supply. In order to meet this difficulty, a power is given to British governors to issue their licence from time to time, by which they may permit the British colonies to fetch this supply from the foreign West India islands in their vicinity, or from the continent of South America. (*q*)

Such is the state of the colonial trade as it at present exists; and such are the leading exceptions (*r*) which, in favour of a new state of things, the growth of our colonies, and the competition of foreign islands, have been introduced to qualify the rigour of the ancient system, and to conciliate as much as is possible the interests of our commerce and navy. But though the changed circumstances of the times

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(*p*) See Rule 4. p. 65.

(*q*) See Rule 5. *ib.*

(*r*) We have passed over the more minute exceptions and provisions of detail, for which the reader is referred to the Chapter on COLONIAL TRADE *passim*, and to the RULES and EXCEPTIONS, p. 61.

Colonial trade.

have compelled the legislature to make these concessions, it is still to be observed that, in the very deviation from the rule, they have never forgotten for a moment the rule itself. They have always so qualified the exception as to restrain the indulgence granted within the necessity of the case. They have deviated only as slowly and as gradually as was possible. They have in no instance made a total sacrifice of the fundamental principle of the subordinate importance of our commerce, when in immediate competition with our navy. The greatest inroad upon this system has undoubtedly been by the establishment of the SPECIAL FREE PORTS and GENERAL FREE PORTS: but the growth of our colonies rendered this concession necessary; and the consequence of refusing this relaxation would have been the entire surrender of the American market to the foreign West India islands. The lucrative trade of our colonies with the South American continent was equally wise and necessary; and the permission of this trade by law only placed upon a legal basis what before was an illicit traffic. The exportation of our rum by vessels engaged in this trade at once encouraged the West Indian planter, and in no degree interfered with any interest of the merchant in the mother country. The lumber trade was soon found to be an indispensable traffic; and it is certainly cheaply purchased by allowing British vessels to export sugars, &c. directly to the United States. Upon the same reasons of policy are the relaxations of the Navigation Law in the direct trade which is permitted between the sugar colonies, and Malta and Gibraltar; and the permission to lade articles in ports of Europe, south of Cape Finisterre, for the benefit of our fisheries, and to extend the trade of the colonies in British America.

Colonial trade.

The general inference from these provisions, at once necessary, and *confined* to such necessity, is, that the government and legislature have only departed from the Navigation System within the degree of the urgency of new circumstances, and have always remembered the reason of the rule in the necessity of the exception.

Trade with Asia, Africa, and America, not being colonial.

The second division of our Navigation System respects the trade with Asia, Africa, and America, not being colonial.

In this trade, the principal object of the legislature was to encourage British shipping; and to abridge, if not altogether to extinguish, the Dutch carrying trade. The object of the third and fourth sections of the navigation act were twofold; *first,* to deprive the Dutch of being the carriers of Europe; to prevent all importation from the opulent countries of the East, except in British ships; and next, to prohibit the rich commodities of these countries from being imported from any other place than those of their original growth and manufacture; or, at least, from such ports only where they could be, or usuaally had been, first shipped for transportation.

Of the nature of the shipping to be employed in this trade.

In this trade, as it originally stood under the navigation act, the ships might be owned by any subject of this country, or the plantations; and nothing

Trade with Asia, Africa, and America, not being colonial.

was said of the *built*. It is to the modern register acts that we owe this most eminent improvement in our Navigation System, that all the vessels employed in this trade must now not only be British owned, but British-built. Before the 26 Geo. III. c. 60., foreign ships were frequently employed in the trade with Asia, Africa, and America; but this latter act effectually put an end to such foreign ships, British owned, by taking from them the privileges of a British ship; so that this trade, after the passing of the registry acts, was in effect as much restricted to British-built ships, as the colonial trade, by the statute of the 7 & 8 Will. The 34 Geo. III. c. 68., which was an enlargement and amendment of the first of Lord Liverpool's acts (*s*) further restricted this trade, and accomplished an equally important object in our Navigation System. Hitherto, the restriction upon shipping, whether British or foreign, had been confined to the *importing* of goods only, except, indeed, in the British plantations, where both imports and exports were confined to ships British-built: but this act extends further; and enacts, that no ship registered, or required to be registered as a British ship, shall be permitted to export any articles whatever, unless navigated by a British master, and by a crew, three-fourths at least of which are required to be British mariners. The exports and imports by these latter acts to Asia, Africa, and America, must now, therefore, be made by shipping of the same built and character as the importations hitherto had been. (*t*)

(*s*) Charles, late Earl of Liverpool.

(*t*) See post. p. 134. As to the employment of foreign ships by

Trade with Asia, Africa, and America, not being colonial.

It was necessary to take this short review of the character of the shipping, before we proceeded to the Trade itself.

The first rule of our Navigation System as respects this Trade is, that no goods or commodities of the growth, production, or manufacture of Asia, Africa, and America, shall be imported into Great Britain in any other than in British-built, and owned, ships.

The first exception to this rule is in favour of the peculiar relations of commerce between Portugal, the United States of America, and Great Britain. (*u*)

But, even in this exception from the first rule, the legislature has carefully avoided any deviation from the second, or any indirect permission of the carrying trade. Therefore, although by a modern treaty, confirmed by parliamentary sanction, goods of the United States may be imported by their own ships into England, it is still made an indispensable condition of this traffic, that the vessels engaged in their importation should be *built* in the countries belonging to the United States; mere property in the ships not being sufficient; that they should likewise be owned by their own subjects, and the master and three-fourths of the mariners must be American. In

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British subjects, see Chapter on the Registry acts, p. 273, *et sequenter*.

(*u*) See American Treaty; Colonial Trade, p. 45. Chap. III. p. 103; and Rules and Exceptions, p. 139.

Trade with Asia, Africa, and America, not being colonial.

addition to this, the goods, the subjects of this trade, must be of native growth, produce, and manufacture.

In the same manner with Portugal; though in respect to the mixed character of her dominions the terms of the dispensation are larger. The 51 Geo. III. c. 47., permits goods of the growth, produce, and manufacture, of *any* of the territories and dominions of the crown of Portugal, to be lawfully imported into the United Kingdom in ships built in the said territories or dominions. But such ships must be owned by Portuguese; and the master, and three-fourths of the mariners, at least, must be subjects of the Portuguese government.

A further relaxation of the first rule in this trade, confining it to British-built ships, has been made in favour of the peculiar nature and constitution of the East India Company; a corporation, whose most singular character of being at the same time merchants and sovereigns in their Eastern territories, gives them a claim to a more liberal confidence than the legislature could safely indulge to individuals or subordinate societies. The statutes regulating the trade of this company have introduced numerous exceptions from the first rule of this branch of our Navigation System. By the 42 Geo. III. c. 20., the East India Company are permitted to import and export goods from and to India and China, in ships not British-built, during the continuance of their charter. And, during the term for which the possession of the British territories in India is secured to the Company, it is made lawful for the vessels of countries and states

Trade with Asia, Africa, and America, not being colonial.

in amity with His Majesty to import into, and export from, the British possessions in India such goods as shall be permitted by the directors of the Company; who are required to frame such regulations for carrying on this trade as may be most conducive to the interest and prosperity of the British possessions in India, and of the British empire. And it is not lawful for the directors to frame any regulations for this trade between India and the states in amity with the crown of Great Britain, which shall be inconsistent with any treaty made or entered into by His Majesty; or which may be inconsistent with any act of parliament passed for the regulation of the trade and commerce of the British territories in India. (*x*)

The next rule under this division of the navigation act is, that no goods or commodities of the growth, production, or manufacture of Asia, Africa, or America, may be shipped or brought from any other place or country, but only from those of their growth, production, or manufacture; or from those ports where they can only, or are, or usually have been, first shipped for transportation, 12 Car. II. c. 18.

This is the rule: and as the legislature, in the colonial trade, proposed to itself the two main objects; the exclusive possession of the trade of the colonies, and the exclusive carriage and transport of their produce and supply in British shipping; so, in the trade

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(*x*) 37 Geo. III. c. 111. And see Part I. c. 3. p. 89, *et sequenter;* where the constitution of the East India Company, their privileges, and the extent and nature of their trade are explained.

Trade with Asia, Africa, and America, not being colonial.

with Asia, Africa, and America, not being colonial, the simple object was the encouragement of British shipping, and the abridgment or suppression of the Dutch carrying trade. With this object, the rule above cited requires in all cases that the trade with those countries should be *direct;* that their produce should be fetched in English ships from the place of production, and not from any intermediate market or stage of deposit which our maritime rivals might establish, as their own emporium.

This principle has been found so beneficial to the naval, if not to the mercantile interests of the country, (but perhaps to both,) that it has since been retained, under all circumstances, except when some peculiar properties of the trade or commodity have required a departure from the rule. (*y*)

Several minute relaxations of this rule will be found in the exceptions detailed in the Chapter on this Trade. (*z*) Thus, raw silk, bark, sarsaparilla, balsam of Peru, and other drugs, the growth of America, are allowed to be imported from other places than those of their immediate production: in the same manner, raw silks, or other goods of Persia, from any place belonging to the emperor of Russia; and cochineal and indigo, from any port in British ships, or ships of a state in amity with Great Britain. Gum senega, coarse printed calicoes, cowries, arangoes, and other East India goods, prohibited to be

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(*y*) See the policy of these regulations more fully explained, Part I. c. 3. p. 85. *et sequenter.*

(*z*) *Ibid.*

Trade with Asia, Africa, and America, not being colonial.

worn here, may be imported from any port in Europe, in British ships; and cotton wool, and goat skins, raw or undressed, from any place in British-built ships. Goods, the merchandise of the dominions of the emperor of Morocco, may be imported direct from Gibraltar, in British-built ships; elephants' teeth and ivory are allowed to be imported from any of the dominions of the crown of Portugal, in British or Portuguese ships, respectively, though such commodities may not be of the growth, produce, &c. of any of the dominions of Portugal. (*a*)

Some changes in the channels of trade, and the scarcity and consequent high price of articles necessary for our manufacting process, have rendered the above deviations from this rule of our Navigation System both politic and expedient. The materials of our manufactures are naturally the subject of peculiar favour; and the rule of allowing nothing but a direct trade, and no intervening carrier or market, has been departed from, when required to procure an abundant and cheap supply of the means of our domestic industry. (*b*)

With respect to America, a practice now obtains which makes it no longer necessary to enquire for the *usual port* for shipping from that country, the whole continent and islands being considered as one place. (*c*) And, with respect to the permission of importing African goods direct from Gibraltar, this

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(*a*) See Rules and Exceptions, Part I. c. 3. p. 139.

(*b*) See 6 Geo. III. c. 52. s. 20.; 15 Geo. III. c. 35. and 31 Geo. III. c. 35.

(c) See Part I. c. 3. p. 131.

Trade with Asia, Africa, and America, not being colonial.

deviation from the policy of our Navigation Laws is founded upon the circumstance of Africa being a non-maritime power, and Gibraltar a convenient British depot.

Our possessions in the East Indies had long been of an indeterminate character; and it has been often doubted, whether they were to be considered as strictly colonial, and therefore within the provisions of the colonial laws; or as Asiatic territories, not colonial, and therefore only comprehended within the second description of the Navigation act. The 12th, 13th, and 14th sections of the Navigation act had indeed made an exception in favour of the Levant trade, the East India Company, and the trade with Spain, Portugal, the Azores, and Canaries; in all of which branches, from the necessity of the case, an importation is permitted, in British shipping, of foreign produce from other ports and places than those of their growth and manufacture. But certain doubts still existing as to the extent of the application of this exception to the East India trade, as well as to the political character of the settlements themselves, the 57 Geo. III. c. 95. was passed to put an end to all difficulties. By this statute it is declared by the legislature, that the Navigation acts do not extend to, or in any way affect, the importation or exportation by the East India Company, or by any other of his majesty's subjects, (in British registered vessels, &c. or ships trading under the provisions of 55 Geo. III. c. 116.) of any goods, at, into, or from any place within the limits of the charter of the said Company; nor do they affect the importation or

Trade with Asia, Africa, and America, not being colonial.

exportation at, into, or from any place whatsoever, in such vessels as aforesaid, of any goods of the growth, &c. of any place within the limits aforesaid, or require that any bond for the exportation or importation of goods in any particular manner shall be given in respect of any such vessels bound to or from any place within the limits aforesaid. (*d*)

European trade.

The third division of our Navigation System respects the European trade, the rules of which are three;—I. No goods or commodities of the growth, production, or manufacture of Europe, hereinafter enumerated; that is, no goods or commodities, the growth, production, or manufacture of Muscovy, or of any territories belonging to the emperor of Russia, nor any sort of masts, timber, or boards; no foreign salt, pitch, tar, rosin, hemp, or flax; raisins, figs, prunes, olive-oils; no sorts of corn or grain, sugar, pot-ashes, wines, vinegar, or spirits called aqua-vita, or brandy-wine, may be imported but in British-built ships, or in British ships owned by His Majesty's subjects, and navigated by a master and three-fourths at least of the mariners British subjects; nor any currants or commodities of the growth, production, or manufacture of any country belonging to the Turkish empire, may be imported but in British-built ships, owned by British subjects, and navigated by a master and three-fourths at least of the mariners British subjects; or in ships of the built of any country or place in Europe under the dominion of the sovereign or state in Europe, of which such goods are

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(*d*) See Part I. c. 3. p. 133.

European trade.

the growth, production, or manufacture; or of the built of such port where the said goods can only be, or most usually are, first shipped for transportation; and navigated by a master and three-fourths at least of the mariners of that country, place, or port.

This rule is founded on the eighth section of the act of Navigation 12 Car. II. c. 18., amended by stat. 27 Geo. III. c. 19. s. 10.

II. No sort of wines, (other than Rhenish,) no sort of spicery, grocery, tobacco, pot-ashes, pitch, tar, salt, rosin, deal boards, fir timber, or olive oil, may be imported from the Netherlands or Germany, upon any pretence, in any sort of ships or vessels whatsoever. (*e*)

III. But bullion and prize goods, and all other goods and commodities of the growth, &c. of Europe, (not being prohibited absolutely to be imported, and not specified in the two preceding rules,) may be imported from any country or place, in any sort of ships owned and navigated in any sort of manner.

The exceptions to the first rule are altogether inconsiderable.

It will be seen that the policy of the legislature in the restrictions on the European trade was much less confined than as respected the colonial trade, or the trade with the three great continents, not

(*e*) 13 & 14 Car. II. c. 11.

being colonial. In the plantation trade the direct aim of the legislature was not only a monopoly of shipping, but a monopoly of imports and exports. In the trade with Asia, Africa, and America, not being colonial, it was of course impossible to impose any restrictions upon the exports to those countries from other ports than British; but, as far as restrictions could reach, and a preference to our own ships was possible, the Navigation Act extended itself. For no imports are allowed from those countries but in British shipping, and no goods or commodities can be shipped but from the place of their growth; subject of course to the exceptions which we have before pointed out. (*f*) But in the European trade it was manifestly impossible to impose such conditions; for though it was good policy to prohibit the importation of goods from the three great continents, unless brought in English shipping; yet it was wisely foreseen, that if we restrained the importation or exportation of European goods, unless in our own ships, manned in the way directed by the act, other kingdoms and states would do the like: a measure which, in its consequence, would amount almost to a prohibition of European trade, and defeat the very intent of the legislature. Several countries, as France, Spain, and Italy, could more easily buy ships than build them. Other countries, as Russia, &c. had timber and materials for building ships, but wanted sailors. The framers therefore of this system contented themselves with the prohibition to import, (except only in English ships, or in ships of the country whence the articles came,) the

European trade.

(*f*) See *ante.*

European trade.

commodities of Russia and Turkey, and the articles enumerated in the eighth section: so that any European merchandize, not there enumerated, and not of the growth, production, or manufacture of Russia and Turkey, may be imported in a ship not English built, nor of the country whence the merchandize comes. But, with respect to our own shipping, the 34 Geo. III. c. 68. has added an important restriction: for even in the European trade no ship, which requires to be registered as a British ship, can import or export any article whatever, unless navigated by a master, and three-fourths of the mariners British subjects. (*g*)

It appears that great quantities of silk had been imported from several places in Europe, which were not the places of its growth and production; and thereby the object of the Navigation act was evaded. The 2 Will. & Mary (*h*) was therefore passed to prevent this evasion. It adds to the goods enumerated in the eighth section, by enacting that thrown silk of the growth or production of Italy, Sicily, or the kingdom of Naples, must be brought from some of the ports of those countries, or places, whereof it is the growth or production; and must come directly by sea, and not otherwise.

The exceptions to the second rule, that no wines, grocery, nor naval stores, may be imported from the Netherlands or Germany, in any ships whatever, are in favour of our naval interests, our fisheries, and a

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(*g*) See *ante*.

(*h*) See Part I. c. 4. p. 162.

political connection with the German and Austrian empire.

European trade.

The rule itself is a remarkable instance of the firmness of the government with regard to the Navigation Laws; for, though the necessary effects of the act of Charles had excited a very general discontent upon the part of foreign merchants, and several efforts were made to procure its repeal, the legislature being only confirmed in their purpose of encouraging the navy and seamen of Great Britain, not only withstood all solicitations, but even increased their restrictions by passing the 13 & 14 Car. II. c. 11. commonly called the *Act of Frauds*, upon which the second rule in the European trade is founded. The object of this act was to meet and elude those frauds by which the Navigation Laws were evaded; and, more especially, to counteract the practice of fetching plantation goods from Holland and the Netherlands, under the pretence that they had undergone some process by which they were rendered Dutch manufactures. This rule, therefore, beyond any former act or ordinance, aimed fully and directly against the great object of the Dutch to become the emporium of Europe.

Some inconveniences, however, of this rule were occasionally felt in ship-building, and general trade; and were accordingly corrected by partial relaxations. Thus the 6 Geo. I. c. 15., permits British subjects, notwithstanding the statute of frauds, to import fir timber, planks, masts, and deal boards, of the growth of Germany, into this kingdom, in British-built

European trade.

ships; and by the 22 Geo. III. c. 78., wines, the growth and production of Hungary, the Austrian dominions, or any part of Germany, are permitted to be imported from the Austrian Netherlands, or any port or place belonging to the emperor of Germany, or the House of Austria, in British ships, or in ships which are of the built of the country or place of which the wines imported are the growth, production, or manufacture. (*i*)

The third rule of the European Trade, that bullion, prize goods, and any commodities omitted to be named in the two former rules, may be imported in any ships whatever, is rather an exception to the former rules, than a rule itself; and, as respects British ships, is further limited, and reduced in practice to nothing by the 34 Geo. III. c. 68., which applies to all imports whatsoever. (*k*)

Such, therefore, are the existing rules of the Navigation System, and the exceptions to them, as regards our European trade. To these exceptions, indeed, may be added the relaxation of the Navigation act in favour of Portugal, since she has removed the seat of her empire to the Brazils, and thus taken away the colonial character of her American possessions, and rendered the Brazils and Portugal itself co-ordinate members of her crown and dominion. When the Brazils by this change became the seat of the State, and all the Portuguese American ports

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(*i*) Amended by 27 Geo. III. c. 19.

(*k*) See Part I. c. 4. p. 186. where the rules and exceptions are stated.

European trade.

were opened to British commerce as a principal empire, and no longer as a colonial dependence, there was a manifest necessity to admit them into our European system. Accordingly, an act was passed (*l*) to repeal in favour of Portugal and the Brazils some considerable provisions of the Navigation act. It was enacted by this statute, that *any* goods of the growth, production, or *manufacture*, of *any* of the territories of the crown of Portugal, might be imported direct from any such territories, in any ship built in any of the territories of the crown of Portugal, a provision including her American as well as European possessions.

Portuguese treaty.

Many objections have recently arisen amongst popular writers, as to the policy of maintaining our existing commercial relations with Portugal, and continuing to give a preference to her wines over those of France. To these, however, it may be briefly answered, that there may be two grounds for a commercial preference: the first, the interests of commerce; and the second, and certainly not the less important, the political interests of the state. Our relations with Portugal are founded upon the latter. It would be manifestly bad policy to aggrandise the power of France and Spain against that of Portugal. The natural ally of England is Portugal; and the natural support of Portugal, a secondary state confining upon a powerful neighbour, is England. There can be no doubt that a commercial connection with France

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(*l*) 51 Geo. III. c. 47. See this act referred to, *ante*, p. 21. in the observations on the trade with Asia, Africa, and America, not being colonial.—And see European trade, *post*. p. 183.

European trade.

would be more lucrative as to a pecuniary result than with Portugal; and, if commerce were the only question, it would be an erroneous policy to adopt a minor state in preference to a principal. But as the maintenance of the political relations of Europe and Great Britain is an end of greater value and importance, it is a good rule of prudence to consult the more valuable object, though with some sacrifice of the secondary one. If our trade with Portugal be less profitable than would be a similar trade with France, the diminution of profit is well compensated by the difference between supporting a natural ally, and aggrandising a natural rival. Nor should it be altogether forgotten, that our commercial treaty with Portugal is not expressed in terms of a changing and merely temporary description; but partakes of the nature of a permanent and fundamental act between the two governments. The words of the Methuen treaty, the instrument of this strict alliance, cannot well be stronger than they are. The king of Portugal therein stipulates for himself and heirs, to admit *for ever hereafter* into Portugal the woollen cloths of the Britons; and queen Anne, on like terms, obliging herself *for ever* to admit the wines of Portugal. It must be confessed, that these are not mere ordinary terms; and that either nation might justly regard itself to be injured, if a treaty of this kind should be considered as a mere conventional arrangement *pro tempore*.

Portuguese treaty.

Coasting trade.

The fourth branch of our Navigation System respects our Coasting Trade, which it regards to belong as peculiarly to British subjects, as the internal navigation of the country itself. Upon this principle, the law confines it entirely to British ships, seamen, and capital; and, as modern times have admitted no relaxation of this original rule, it affords no observation for further remark. Coasting trade.

The fifth division of the Navigation Laws respects our fisheries, the existing rules of which may be summarily stated to be as follow:—

The Fisheries.

I. Every British vessel employed in the British fishery shall be British-built, British-owned, and shall be manned and navigated by a master and mariners *all* British subjects. (*m*)

II. No fish whatever, of foreign fishing, excepting only eels, stock fish, anchovies, turbots, lobsters, sturgeon, and caviare, shall be imported into England. (*n*)

III. All fish caught according to the first rule, *i. e.* by British subjects, British ships, and duly manned, &c. may be imported into Great Britain *duty free.* (*o*)

The value of our fisheries, both as a pre-eminent branch of commerce, and more particularly as tending to give a constant supply of seamen and maritime skill to our navy, is too obvious to require any

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(*m*) 34 Geo. III. c. 68., and 42 Geo. III. c. 61.

(*n*) 18 Car. II. c. 2. 32 Car. II. c. 2. 10 & 11 Will. III. c. 24. 1 Geo. I. st. 2. c. 18. 9 Geo. II. c. 23., and 26 Geo. III. c. 81. sec. 8, 43 & 44.

(*o*) 49 Geo. III. c. 98. sec. 13. and see Part I. c. 6. on the Fisheries, p. 193.

The Fisheries.

further observation; except that, from the very commencement of our system of naval defence, our legislature has recognized their importance, and in every period has supported our exclusive possession of them by the most active encouragement.

In earlier times the Dutch possessed an undoubted superiority in this branch of general commerce. The lower rate of wages; the narrower sphere of the competition of manufacturing establishments with ship owners; and the peculiar habits of the Dutch in working, and even building small craft, were some amongst the causes of this superiority. But by the prudent encouragement of the British legislature, these obstacles have been gradually overcome; and we now as much excel all other nations in the produce and exportation of our fisheries, as in our manufactures themselves.

Of the System of Bounties in the Fisheries.

The chief improvement of modern times in this branch of our Navigation Laws has been, in the gradual removal or modification of nearly all the bounties by which these fisheries were originally maintained. There exists no reasonable doubt, that the bounty system is no longer good than it is actually necessary; and that it is no longer necessary, when the trial of fixing the roots of a branch of commerce has been sufficiently made, and has either answered its object, or has totally failed. In all ordinary circumstances the system of bounties is contrary to just commercial principles. A branch of trade or commerce may be cultivated with advantage or not. If it can be cultivated with any hopes of

Of the System of Bounties in the Fisheries.

profit, the sagacity of dealers or growers will discover it, and will make the required essay without any inducement of bounties. If it be not cultivated, it is only abandoned because not worth the cost of labour and capital. Bounty, therefore, according to these principles, is either superfluous, as where it gives to those who would produce or manufacture the required article without it; or it is a mischievous tax upon the community for individual traders, inasmuch as it originates and maintains a wasteful and unprofitable branch of trade, and sinks a greater value than is ever repaid. On the other hand, there are certainly some cases in which the system of bounties may be useful to a country; for there is a third or middle condition between a branch of trade being lucrative or not. It may not, for example, be *immediately* lucrative; it may not make the profitable return in due time for mercantile views; it may be profitable for a State, which is a lasting being, though not for the life of an individual. It may be for the interest of the country, though not for the individual merchant or grower. This is the principle of the bounty system; but this principle has its limits. It would be absurd to give more for a branch of trade, or growth, or fishery, than, in the present state of all the interests of the country, it is worth. Where the object of the bounty is to clear away the first impediment; to make room, as it were, for the experiment of its possible profit, the bounty of course must end either with the full success, or with the total failure, of the experiment. A permanent bounty is a permanent tax; a submission to a permanent loss; and however, under the earliest state of our marine, such an

The Fisheries. annual tax might be a sacrifice of one interest to advance another; it is certain that in the present condition of the navy and country such a fruitless expence is no longer required.

Of the System of Bounties in the Fisheries. From the necessary effects of our fisheries upon our naval growth, it might be good policy, in the early state of our marine, to institute such fisheries at the expence of their full value, and to force their growth into our system. But now that our navy does not require the same extent of aid, there is no longer any good policy in such an attempt. The proper inference of what we have above urged is, that the bounty system was never adopted by our legislature upon *mere* commercial principles; and, therefore, does not fall within the objections of popular writers as to the anti-commercial nature of such a system. It was adopted, like the whole of our Navigation Laws, with a direct view to our naval growth; and was admitted only under the principle of the subordinate nature of our trade in comparison with our naval defence. The legislature knew that it was originating and maintaining establishments, which in a commercial point of view might possibly be worth less than they would cost, but which, if they contributed little to our commerce, repaid amply as a nursery of seamen.—They knew they were trading, or growing, and encouraging trade, growth, or fishery, in a manner which no individual merchant would undertake, and which would not return a suitable profit to any private adventurer. But they knew, at the same time, that an adventure might be profitable to a state which would be injurious to an individual; and that it

Of the System of Bounties, &c.

might be good policy in a corporation, so durable as a nation, to found, build, and purchase with a view to a more remote futurity than belonged in prudence to the aims of human life. In these principles the bounty system originated. And these circumstances having now passed away, and our navy no longer requiring this support at the expence of our revenue, the system naturally ceases with the reasons under which it grew.

The above brief view of the policy of this system, and its real objects, may be an answer to those, who with more levity, than either candour or knowledge, have imputed the grossest ignorance to the ablest men of any period; and, upon the ground of their own imagined clearer understanding of commercial principles, claim a triumph over the illustrious founders of our Navigation Laws.

Of the Registry Act.

The last division of our Navigation System, for so it may be considered, is the Registration of British ships; a part of the system which gives effect to the whole, and brings the existing state of the British marine at all times under the view of the government and legislature. The object of registration is in fact three-fold:—1st, to ascertain the built and property of ships; 2dly, to prevent foreigners from being secret owners in them, by always having a clear *constat* of the property in public documents; and, 3dly, to preclude any evasion of the law by our own merchants, and to give the due preference to British ship-builders and native mechanics.

Of the Registry Acts.

For the purpose of maintaining and advancing our naval interests the law requires that our own trade should be carried on in ships of our own built. In order to enforce this policy, and to render impossible any evasion of it, the law further requires that every British ship shall be registered at the time of sailing from her first port, and that without such registry she shall not have the privilege of a British vessel: and that, upon every change of ownership, an indorsement of such change shall be made upon the certificate of registry. By the joint effect of these two regulations, every ship may be effectually traced back to its origin. (*p*) And unless by a concurrence of fraudulent acts, which by the number of persons necessarily concerned must be nearly impossible, no ship of foreign built can be introduced into the British marine.

Under the Navigation Act of Charles II. ships were required to be the property only of British merchants. It was only in the progress of the system that the qualification of being British *built* was likewise added. The ancient Navigation Act thus encouraged only British seamen and merchants. The existing Navigation System, as now seconded and enforced by the Registry Acts, has added to these two objects a third equally important object, the encouragement of British ship-building: and has therein given the strongest security to our naval superiority.

(*p*) The reader is referred to the acts for the forms of registration, and indorsements on the certificates, as they are too minute for our present purpose. See Part I. c. 7. on the registry *acts*, *passim*, page 227, *et sequenter*.

Of the Registry Acts.

Without these acts, the greater portion of our ships would be supplied from America, Holland, or any other country, where the low rate of wages, or the greater proximity of materials, might render ship-building cheapest. But by the force of these laws, a due proportion of the capital of the kingdom is directed towards the building of ships. The Registry Acts have certainly the same character of monopoly and commercial impediment with the other part of our Navigation System. But they have the same counterweight of producing a greater good than they take away: they advance our navy in a greater proportion than they impair our commerce. Indeed, the largeness of the capital employed in our ship-yards renders it a matter of great doubt, whether the restrictions of the Registry Acts affect in any degree the price of ship-building; and whether, from the extensive basis of this manufacture itself, ships are not built cheaper in English docks, than they could be fabricated by any poorer and less populous country.

In this point of view our Registry Acts, like the other portion of our Navigation System, will appear not only to have produced the immediate good intended for our naval interests, but to have corrected the mischief at first necessarily inherent in them, as a restriction upon the general freedom of commerce. So false are all general principles when applied without distinction through all particulars.

The principal rules of the Registry System may be cursorily stated to be as follow:—1. That every ship is to be deemed a British-built Ship, which has

Of the Registry Acts.

been built in Great Britain or its colonies, or has been lawful prize. 2. That every such ship above the burthen of fifteen tons shall be registered by the owner; and a certificate obtained of such registry, in the port to which the ship belongs. 3. That without such registry, and such certificate, no ship shall clear out as a British ship; but, if departing from port without being so registered, and obtaining such a certificate, shall be forfeited. 4. That without such registry and certificate all ships, although they belong to British subjects, shall be regarded, to all intents and purposes, as alien or foreign ships. 5. That, upon every alteration in the property of a ship, an indorsement is to be made upon the register according to a given form, and a copy of such indorsement is to be delivered to the officer authorised to grant registries. An entry thereof is to be indorsed on the affidavit on which the original register has been obtained, a memorandum to be made in the public book of registers, and notice to be given to the commissioners of customs. 6. And upon the transfer of the property in any ship, whether in whole or in part, the certificate of the ship's registry is to be accurately recited in the bill of sale, or other instrument of conveyance, *in words at length;* and no transfer, either of whole or part, is valid, except it be in *writing*. 7. That, as often as the master of a ship is changed, a memorandum thereof shall be indorsed on the certificate by the proper officer of the customs. 8. That the owner is to cause the name by which a ship is registered to be painted in a conspicuous part of the stern; and such name is not to be changed. (*q*) 9. That if a certificate of registry be lost or mislaid,

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or if a ship shall be altered in form or burthen, or from any denomination of vessel to another, by rigging or fitting, she must be registered *de novo*, and a new certificate granted. 10. That masters of ships are, on demand, to produce their certificates to the principal officers in any port within the king's dominions, or to the British Consul or chief officer in any foreign port. 11. That no ship or vessel which is registered, or which is required by law to be registered as a British ship or vessel, shall be navigated, but by a master, and three-fourths at least of the mariners British subjects. (*r*)

Such are the principal rules upon which the Registry acts are founded; the more subordinate rules, qualifications, and exceptions, will be found in the body of this Treatise, together with the numerous decisions in the Courts of Law, Equity, and Admiralty, to which these acts have given rise. The statute of 7 and 8 Will. which was the origin of the modern Registry acts, was only intended to prevent fraud and abuses in the plantation trade. It was the policy of the new Registry acts (26 and 34 Geo. III.) to enlarge and improve the provisions of that statute; and to extend and apply them to all merchant ships, whatsoever, exceeding a certain tonnage.

In the body of our Work the reader will find

(*q*) 27 Geo. III. c. 27. s. 13.

(*r*) 34 Geo. III. c. 68. s. 3. 41 Geo. III. c. 95. And for a more detailed account of the Registry Acts, see Part I. c. 7. on the Registry Acts, p. 226. *et sequenter*.

Of the Registry Acts.

the several rules, and their reasons, treated with the exactness, and in the detail, which their legal character and importance require. Enough is above said here to explain in a preliminary manner their wisdom and efficacy, as respects the accomplishment of their object; that of precluding any evasion of the Navigation Laws, of preventing foreigners from having an interest in British vessels, and *tabulating*, as it were, the maritime strength and resources of the kingdom, in aid of those who may be charged with administering the duties and powers of government. Any augmentation or decrease of British shipping is thus as immediately known by the government, as any rise or diminution of the Revenue. But the first step towards the remedy of any evil is the exact knowledge of its nature, degree, and cause.

In the examination of these acts it will likewise be found, that they connect and combine the public interest of the state with the private advantages of the merchant; and therein indemnify the latter for the numerous and complicate forms they prescribe. They secure to the British mechanic and artisan the building and equipping of all vessels employed in every branch of our trade. They extend, moreover, their beneficial effects into the various departments of commerce, and into those dealings and contracts which grow out of and depend upon property in shipping. The publicity of the Register acts, and the circumstance of their having the character of National muniments, gives confidence to all contracts relating to any interest in this property. They prevent frauds upon underwriters; and by making the property in shipping

Of the Registry Acts.

always a legal and never an equitable interest, they give a security to all transactions respecting ships, which cannot be acquired in any other branch of business. They enable, moreover, a purchaser, the assignees of bankrupts, and other representatives of an owner, to trace a ship from port to port in all the various transfers through which she may pass; and as every change of property in a ship, whether in or out of her port, must be publicly recorded, they bring under the eye of the legislature every transaction respecting shipping, and every circumstance affecting its increase or diminution. And thus, as is well observed by an able writer on this subject, to whom the Author of this treatise is so much indebted, (*s*) a very considerable utility arises from the documents which are formed in the execution of the Registry acts. The registry of shipping, which is made up to the 31st of September in every year, contains facts of importance which become premises for conclusions both political and commercial. In this registry is seen how many ships and vessels belong to every port in the kingdom, their tonnage and their size, and the number of seamen which they employ. It is now accurately known where to look for the most abundant supply of seamen, when the public service demands them. It is further known at what port to enquire for ships; whether they are wanted by the government for transports, or the merchant for freight.

(*s*) Mr. Reeves, p. 488. And see Part I. c. 7. p. 267.—These acts, moreover, have very much abridged smuggling, which prevailed to an alarming extent before the Registry Acts.

Of the Registry Acts.

Next to the Registry acts, we have considered those beneficial statutes, by which the rigour of the law, respecting the seizure and forfeiture of ships for any breach of the acts, (relating to the shipping, trade, and commerce of the country,) is so considerably relaxed, as to adapt itself to the possible occasions of some strong equity and expediency which circumstances may throw up. This has been done by two recent acts, in a manner so as to maintain the policy of the general rule, and still to open it to such exceptions as commercial equity may require. (*t*) It will not, perhaps, be too much to assert, that a great portion of the system of those equitable statutes arose from the celebrated judgment of Sir William Scott, in the case of the Betty, Cathcart. (*u*)

In concluding our remarks upon this part of our Navigation Laws, and this Introduction to the first part of our Treatise, it would be a want of patriotic feeling, and of the justice due to a great name, not to acknowledge that the country owes this system of the Registy acts, in its present perfection, to the late Earl of Liverpool; one of those men, whose name will always descend with the greatness, opulence, and commercial superiority of the country; as having employed a long and laborious life in an indefatigable pursuit of the public good, and as having at

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(*t*) See 27 Geo. III. c. 32.; 51 Geo. III. c. 96.; 54 Geo. III. c. 171. These acts give a power to the Commissioners of Customs and the Lords of the Treasury to remit penalties and forfeitures, under the Navigation and Shipping acts, &c. upon certain terms, and conditions. See Part I. c. 8. p. 330.

(*u*) 1 Rob. 220.

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length so successfully accomplished what, through all impediments, he so invincibly followed. It was the talent and industry of this nobleman, which first reduced into light and order what before was but a mass of incongruous and contending elements. By bringing to this object of his study the practice of business, and the knowledge of life and character, Lord Liverpool foresaw, and thereby prevented, all those evasions which had hitherto rendered the system of Registry nugatory in practice; and by having a deep and exact knowledge of the true principles of trade and commerce, he was enabled, better than any man before or since, exactly to limit a general principle, or to restrain a necessary exception, at those precise points of each, where either the principle was less true in practice than in theory, or where the exception cost a greater sacrifice than the end for which it was introduced was worth. The result of such talents, knowledge, and industry, thus employed, is the system of registration such as the public now possess it; and, therein, such a buttress to our Navigation Laws, as will render this magnificent portal of our National defence as lasting as the citadel itself, of which it is an out-work. Without our commerce, and our commerce under the Navigation System, our existing naval dominion and superiority would be but a tree without a root; but whilst thus planted in the inexhaustible resources of our national wealth, and fed through all its height and breadth by a never-ceasing spring, that Navy and Commerce, by which WE have become what we are, will continue for centuries to be the soil and the shade under which our children's children shall maintain their descending inheritance.

II. OF MERCHANT SHIPPING AND SEAMEN.

Part Second. Of Merchant Shipping and Seamen.

AS the first portion of our Work treats of the subject of the Navigation Laws, our second proceeds to the consideration of Merchant Shipping and Seamen. In considering the Law of Shipping as a whole, but divisible into its subordinate parts, the mind immediately perceives that the subject matter distributes itself into three principal members:—The first, the Navigation Laws, under which every vessel must be built and navigated; and which, therefore, is the foundation and commencement of the whole System.—The second is the ship itself and crew, and whatever belongs to the ship, abstracted from its employment by the merchant.—And the third and last part treats of such employment of the ship by a merchant charterer or freighter, and generally of all contracts, under which merchant shipping is hired or let out. Such, therefore, is the order of our subject and the division of our subject matter. In the former part of our Introduction we have endeavoured to give a general prospect of the *leading heads* of our Navigation Laws, and of the principles upon which they rest. In this part it is proposed to execute the same purpose as regards the Law of the Ship itself, the owner, master, and crew, abstracted from its employment under a contract with the merchant, and further separated from the detail and discussion, which belong to them in the body of the Work.

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Under this relation, the first point of consideration is obviously the property of the ship, the manner of acquiring or alienating it; and, as such property may be possessed by several in common, the rights and liabilities of owners and part-owners: the second, that of the legal authority, duties, and liabilities of the master: and the third, that of the duties of the seamen, and the legal mode of their hire and payment.

First, therefore, as respects the property of ships in whole or part.

Of acquiring property in ships.

1. As respects property in ships, it is of course acquired ordinarily either by being the builder, or by purchase from another. In purchase from another, there is this main difference between a ship and another personal chattel, that from consideration of its great value, and from a kind of public as well as private character, the law requires all transfers of ships to be by bill of sale or other instrument in *writing*.(x) The ship at the time of sale is in port, or absent at sea. If in port, the sale must be by bill of sale, and should be followed up by some act of possession. If absent, there must be the same bill of sale; and, upon the ship's arrival, the title should be confirmed by the same possession. Such possession, however, is in neither case an absolute legal requisite; but in both is a most necessary prudential precaution, in order to defeat any claim in case of the bankruptcy of the vendor under the allegation that the property remained in the order, disposition, and controul, of

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(x) 34 Geo. III. c. 68. s. 14, 15, and 16.

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the bankrupt seller. As respects a captured vessel, the bill of sale must be accompanied with a certificate of condemnation, and followed up by her due registry. (*y*) In all transfers the due registry must of course be made; if the ship be in port, immediately; if absent at the time of sale, within ten days after her arrival.

Of the mortgagee of a ship.

2. A frequent relation amongst ship-owners is that of being mortgagee to the vessel of another. Such a mortgagee is, as to certain circumstances, not an owner; and is, therefore, not liable for necessaries or services for the ship. He is in fact, for most purposes, only in the same situation with the mortgagee in real property. But if he be in possession of the ship, that is, if he be the registered owner, and in *possession*, he is of course owner *de jure et de facto;* and, therefore, liable accordingly. But a registry by itself is no proof of ownership in a civil suit; for it is capable of being made without the act of the party himself; and in almost all cases there is a possibility of its being so made; so that an insolvent owner might add to his own name in the registry that of a solvent man, and thus render a person liable without his own act.

3. Another frequent relation amongst owners is that they charter their vessel to a merchant to be employed by him as a general ship: in which case two persons are ostensibly held forth to the public as owners; the actual owner; and the merchant char-

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(*y*) See Part II. c. 1. p. 346, 347, &c.

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terer exercising all the acts of ownership. In this case the distinction must be taken, whether according to the terms of the charter-party, and the manner of navigation and service, the ship itself be let out, or only the *room and space* of the ship. If the ship itself be let, and the captain and crew be effectually the servants of the merchant-charterer, the merchant will be liable for all necessaries, accidents, &c. But if the *space or room* only be let out, and the owner remain in full controul and dominion of the ship, the owner will himself be liable for all necessaries, accidents, &c.; except only as respects the persons with whom the merchant himself has contracted, that is, the under or subordinate freighters.

Of part-owners.

4. But a fourth, and the most frequent of all relations of ship-owners, is that of being part-owners with each other: that is, possessing a ship in shares. The two most common questions under this circumstance are,—first, how far one part-owner is liable for the acts of another; and, secondly, in the event of disagreement with each other as to the employment of the vessel, how the decision is to be made: each person possessing his own part in exclusive dominion, and neither having any representative character as regards the other. With respect to the first of these questions, and in all cases which arise under it, the principle lies in the difference between partners and part-owners. Partners are two or more persons, who have so united, and as it were incorporated, with each other in prosecution of some *general* concern, that the act of one is the act of both; and so far as relates to the general concern, each represents him-

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self and the other. But part-owners have no other union nor association than the common possession of the same personal chattel. In partnerships, properly so called, one man cannot become the partner of another *without* his consent; but part-owners may be imposed upon each other, without consent; such as by purchase, succession, &c. They have, therefore, no general representative; nor can one act generally for the other. But as it is a necessary presumption of law, that the common possessors of a valuable chattel must *will* and desire whatever is necessary to its preservation; and, in their absence, must equally *will* and desire the profitable employment of their common property; so the law further infers, as a necessary consequence from the first presumption, that a part-owner on the spot has an implied authority from the other absent part-owners, to order for the common concern whatever is *necessary* for the preservation, navigation, and proper employment, of the ship. This is the principle, and the limit, of the liability of part-owners. Part-owners, therefore, are liable for *necessary repairs* ordered by one of themselves. They are equally liable for *necessary* stores taken up by the captain, or one of themselves, during the voyage. But they are not liable for an insurance ordered by one of them; neither for enlarging a ship, nor for painting it. But, as respects the necessary repairs and expences of the ship, part-owners are bound to the third persons who make those repairs, not only for their own share, but for the whole; and therefore, if any one fail of paying his share, the others must pay it rateably for him. The reason is, that they are partners as respects the *necessaries* and

Part-owners.

proper employment of the ship. Upon the same principle of their being partners, so far as respects the contracts and concerns of the ship, they must sue and be sued jointly; for example, they must sue their freighters jointly; and, on the other hand, may claim to be sued jointly by their shipwright, &c.

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5. As respects the settlement of any differences which may arise amongst themselves, such differences usually arise, either as regards the employment of the ship, or as regards the settlement of the accounts. As respects the employment of the ship, if the majority of part-owners agree to employ the ship in a certain manner, but cannot procure the consent of the other part-owners, the Court of Admiralty (upon the arrest of the ship by the dissentient minority) will then take a stipulation from such majority in a sum equal to the value of the shares of those who disapprove of the venture, that the stipulators will bring back the ship, or pay the latter the value of their respective shares. The ship then sails at the charge, risk, and profit of the stipulators.

Part-owners.

6. If the disagreement respect the adjustment of accounts, and there be no written agreement by which the part-owner concerned has consented to account as if in *severalty*, the only remedy, as between part-owners, is by a suit in a Court of Equity. But if there be a written agreement to account as if in *severalty*, the Common Law will attach upon it; and an action may be maintained against the part-owner so agreeing. This is, therefore, the more prudent mode.

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Part-owners.

7. As each part-owner has a dominion in his part, and as his part and those of others are inseparably connected as respects the use; so each part-owner has a dominion in the ship, whilst in possession. One part-owner, therefore, cannot recover damages against another for employing a ship *without or against* his consent, even though the ship were lost. In the same manner, there is no redress for one part owner, neither in the Courts of Law nor Equity, if the ship be sent or taken to sea without his consent. The remedy is to arrest the ship, previously to departure; in which case the Court of Admiralty will order the stipulation above-mentioned. But if one part-owner have possession of the ship, he has the dominion of the ship, and may use it as a tenant in common; that is, subject to account for profits, and responsible for its injury or destruction; but within those limits he is perfectly free to use it.

The above are the principal questions, and the source of the principal cases, which arise under ownership and part-ownership. The detail and more accurate distinctions belong to the following Treatise. The above synopsis, however, may not be without its use in aid of memory and reference.

Secondly,—As regards the duties, liabilities, and authority of the master; or, in other words, his legal qualifications; his authority to employ the ship; and his power to bind his owners for repairs, stores, and necessaries.

Of Merchant Shipping and Seamen.

Of the qualifications of the master and seamen.

8. The qualifications of the master and seamen, as British subjects, under the Navigation Law, have been already mentioned. By these acts, chiefly consolidated in the 34th of the king, (z) the following are the rules and qualifications as respect the master and seamen:—1. In the *general* trade by British ships, the master and *three-fourths* of the mariners at least must be British subjects, with the exceptions hereafter mentioned. 2. In the *coasting* trade, the master and *all* the seamen must be British subjects. (a) 3. And this legal proportion of British seamen is to be kept up during the whole voyage, unless in case of sickness, death, desertion, or capture of any or the whole. 4. The master of a British ship shall in all cases be a natural-born subject; or a naturalized subject; or a denizen by letters of denization; or one who has become a subject by virtue of conquest or cession, and has taken the oath of allegiance as such. 5. But foreign seamen, who shall have served in time of war three years on board a king's ship, and shall have obtained a certificate of faithful service and good behaviour from the commander, shall be deemed British seamen on taking the oath of allegiance. 6. But the qualification in all cases, and by all persons, is forfeited by taking an oath of allegiance to a foreign power, except under

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(z) 34 Geo. III. c. 68.

(a) But four or more of the commissioners of customs in England, and three or more in Scotland, may license the employment of foreign mariners (not exceeding *one-fourth*,) in any vessel fishing on the coast, for the purpose of instructing British mariners in the art of fishing, or curing fish. And, as respects the fisheries generally, the prior Navigation Acts are saved from this act.

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the terms of a capitulation, and for such capitulation only. 7. No ship, however, is to become forfeited for the employment of an unqualified person, where such disqualification was unknown to the owners and master. 8. But in the seas of America or the West Indies negroes may be employed. 9. And, in the seas to the eastward of the Cape of Good Hope, Lascars, and other natives of the countries to the eastward of the Cape. 10. The ship and cargo are liable to forfeiture for any breach of these rules, in the same manner as if contraband. 11. But if a British vessel be in a foreign port, and have been compelled by necessity to engage a greater number of foreign seamen than allowed by law, such vessel shall not be liable to forfeiture upon production of a certificate of such necessity from the British consul resident in such port; or, if there be no such consul, of two known British merchants there resident. 12. And, in the case of war, the king may publish a proclamation, by which he may allow British vessels to be manned with foreign seamen in the proportion of three-fourths of the whole crew. Such are the qualifications required by law in masters and seamen.

Of the authority of the master.

9. As to the authority of the master to employ the ship, the general rule is, that the owners are bound by every lawful contract made by the master relative to the *usual* employment of the ship. The reason is, that the master is the agent and servant of the owners for the conduct, government, and controul of the ship in its usual way; and, therefore, all engagements by him for such usual employment are the acts and contracts of a servant within the subject matter of his

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commission. Therefore, if a master receive goods on board in the usual employment of the ship without the knowledge of the owner, the owner will be liable for their loss to the freighter. But if the master take goods not in the *usual* employment of the vessel, the owner will not be liable. The distinction is, that in the one case he is a servant acting within his trust and commission; in the other, he is acting beyond it.

Of the authority of the master.

10. Upon the same principle, if the master (being in a foreign port) enter into a charter-party in his own name for the employment of the ship, the owners are bound by it; and the merchants may have an action on the case at common law for its faithful performance. And if the master make any particular engagement or warranty, such as that the ship shall sail with convoy, or that he will load or deliver within a certain time, the owners will be bound by such special contract, although made without their knowledge. In a word, the master is the confidential servant of the owners in all that concerns the usual and ordinary employment of the vessel, and his contract within this service is that of an acknowledged agent for a principal, and servant for a master. And what is the *usual and ordinary* employment of the ship is to be determined either by the course of its *actual* employment, or by that of vessels in the same trade or service.

11. But as the immediate act of the owner himself necessarily supersedes the authority of the servant; so if the owners have themselves made a special engagement for the employment of the ship, the master

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cannot of course annul it. In the absence of his owners, the master is the servant to act for them. In their presence, his duty is to obey.

Of the authority of the master.

12. It is another rule, that for the sake of the convenience of trade the master is himself liable upon his own contracts, and must indemnify himself from his owners. Those who contract with him for the ship have a two-fold remedy; one upon the master, and the other upon his owners: and sailors have a third security upon the ship itself, by a suit for wages in the court of Admiralty. Such, therefore, are the general principles of the authority of the master as respects the employment of the ship.

13. The authority of the master to bind his owner for repairs and necessaries is a consequence from the same principle; such an authority being necessary for the preservation of the ship, and being legally presumed to be given, because absurd to be withholden. The master, therefore, is authorized to provide all *necessaries* for the ship. And such necessaries may be either repairs, stores, or money. For such *necessaries* the owner is liable. But the creditors *generally* must prove that such repairs or money were necessary; for if the owner should negative the existence of the necessity, his liability ceases.

14. The custom of merchants, and therein the law which adopts the custom, has introduced two modes of making such repairs, or taking up such money, by masters; the one, upon the personal credit of the owners; and the other, upon the hypothecation

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of the ship. If the repairs or money be made or taken on the personal credit of the owner, the owner, as above said, is liable; subject only to proof, under any suspicious circumstances, that the repairs were reasonably fit and proper, and that the money or stores were wanting.

Of the authority of the master.

15. But as the hypothecation of the ship is manifestly a better security than the mere personal credit of the master and owners, money and repairs in a foreign port are more usually secured by an instrument of this kind. It is unnecessary to add that the master has the authority to give hypothecation bonds, or bonds in the nature of bottomry, according to the necessity of the case; and that the ship is thus bound in *specie* to the repayment of the money lent. The master has this power, because it is necessary to the preservation of the ship, which in foreign ports, where neither master nor owners were known, could not procure the necessary repairs upon personal credit. And the law of England has thus recognized and adopted it upon the double principle; first, of the custom by the law merchant; and, secondly, from its manifest necessity.

16. But as this power of the master amounts almost to a complete dominion and disposal of the property of another, the custom of all countries, and the law of our own amongst them, limits this hypothecation by the master to the circumstance of the vessel being in a *foreign country,* or in the course of her voyage, and not in the place of her owner's residence. But the courts have given a liberal interpretation to the

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term place of residence; and in two cases, as will be seen in the body of the Work, (*b*) Ireland and Jersey have been deemed foreign ports, sufficiently to justify the master in taking up money upon bottomry.

Of the authority of the master.

17. If a ship, therefore, be in a state of necessity, and in the course of her voyage, whether she be in a foreign port, or in a port of one British island (the owners living in another) or even in a remote part of the same kingdom, the master may hypothecate ship, freight, and cargo, for her repairs and necessaries. But three circumstances must always exist in the condition of the ship at the time of hypothecation:—1. The state of necessity of the ship for repairs, stores, or money. 2. Such a remoteness from the owners as not to admit of awaiting their own advice or aid. And, 3dly, the impossibility, or difficulty, of obtaining supplies on the personal credit of the master or owners.

18. Without such bonds of bottomry and hypothecation, the creditors of a ship can have no remedy on the ship, in specie, as the subject of a specific lien for repairs made, or necessaries supplied. Thus the master has no lien for his wages, nor even for money advanced by him for the necessaries of the ship. The reason may be briefly said to be, first, because a lien always presumes the possession of the subject matter of lien by the creditor; and, secondly, from the manifest mischief to commerce, and to individuals, in the delay which would be occasioned by applying

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(*b*) Vide page 405, Vol. I.

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such a practice to ships. But if a shipwright, who makes the repairs of the ship, have such vessel in his manual possession, that is, in his dock, and without the master and crew on board, he will of course have a lien for his repairs, unless there be a special custom of the port or place to the contrary; or unless the work be done upon a credit. For with respect to lien, the general rule is, that it obtains only where a ready-money payment is due upon the completion of the work.

Of the authority of the master.

19. As the master cannot hypothecate the ship but in a case of necessity; so there must be a still stronger necessity, which can authorize him to sell it. Indeed this necessity must be so supreme, as very rarely, and scarcely in possibility, to occur. As the master is employed only to conduct and navigate the ship, the sale and disposal of it are manifestly beyond his commission; and are, therefore, the unauthorized acts of a servant disposing of that property of his master which he is entrusted only to carry and convey. This is, therefore, the principle not only in all customary cases, but in cases of danger and ordinary necessity. In all such circumstances, therefore, the duty of the master (if the ship be stranded, and cannot be got off, or be so injured by tempests as to be beyond repair or safe return,) is to await, if possible, a communication with his owners. But if this be impossible in time for the preservation of the ship in bulk, it is still a question of law, and on good grounds, whether he shall be allowed to sell, or shall himself break up the materials, and retain them for the owners, or wait their advice. On the one hand, it is certain that such

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Of the authority of the master.

a power in the master would be so *generally* dangerous, and the occasions of any *particular* loss must be so rare—and the loss, being only the difference between the value of the stranded ship sold to others to break up, and the value of the same materials in the hands of the master, must be so inconsiderable, that it seems a good prudence to elect the particular rather than the general evil, and to maintain the general security of merchants and owners at the cost of some particular sacrifice. On the other hand, the law will always presume an authority in agents and servants necessary to the conservation of the article, or to the preservation of as much of its value as the occasion may admit. The case seems yet undetermined as between owner and master in the common law-courts. But the first principle seems the most sound, and would probably lead to the decision of the court. (*c*). The master, as we have before observed, is *de jure* the agent of the owner of the vessel; but he has no such extensive relation to the freighter, unless he be specially constituted his agent. Unless, therefore, in the case of an extreme necessity, no act of the master can affect the owner of the cargo; he may, under certain circumstances, hypothecate the cargo; or even sell a part to repair the ship: but as he can only act for the presumed benefit of the freighter, and as it can scarcely ever be for the be-

(*c*) See a late important decision on this subject in the Court of Common Pleas, Idle *v.* Royal Exchange Company, 3 B. Moore, 115. That, however, was an action against underwriters, in which the owners of the ship *submitted* to, or in other words did not *contest*, the right of the master to sell the ship. See Part II. c. 3. *passim*, and Part III. c. 3. p. 96.

nefit of the freighter that the entire cargo should be sold, and the adventure broken up, the power of sale cannot, it should seem, extend to the *whole* cargo under any circumstances.—This point at least is doubtful. Of Merchant Shipping and Seamen.

THIRDLY, As to the seamen and their wages.

20. The first rule is, that the contract of the seamen for service must be made with the ship-owner, or master, by a written agreement signed by him and the mariners; such agreement to express their wages, and the voyage for which they are hired. The contract thus signed becomes the articles by which the seamen are bound to the master. If a seaman, after having signed the articles, refuse to proceed, or desert, he may be summarily arrested and punished by a justice of the peace. Absence from the ship, without permission of the proper officer, is punishable by forfeiture of two days' wages for every day of such absence. Leaving the ship without a written discharge from the proper officer is punishable by forfeiture of a month's wages, and disobedience to any lawful command of the master by forfeiture of the whole wages. Of the seamen.

21. These articles of agreement have been deemed to justify the reasonable correction of the seamen by the master; namely, such correction and authority as a master may exercise over his apprentices; such as may be necessary for the purpose of the government of the ship, and for the suppressing immorality and vice of all kinds. But, on the other hand, the law

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having a due regard to the liberty of the subject, and to the different degree of the public interest concerned in the merchant and king's services, regards this exertion of authority with the greatest jealousy; and most strictly confines it within those limits which are necessary for the safety of the ship and the due progress of the voyage. Accordingly in all cases a seaman, who has been beaten and imprisoned by the master, may, upon his return to a British port, bring an action against him; to which the master must plead *specially upon the record* that the seaman had committed some particular fault, (specifying such fault) and that he had corrected him only moderately for it.

Of the wages of the seamen.

22. As respects the wages of seamen, the principal points of consideration are, how and when they are earned; and by what means they are recoverable in law. As regards the earning of wages by the seamen, the general rule is, that if the voyage be completed, the freight earned, and the labour of the seamen be not rendered useless by the loss of the vessel by sea or capture, the sailors have earned their full wages. If the vessel be lost or taken, the seamen lose their wages; but not by sickness or accident during the voyage. And as the seamen are bound to the master, so is the master to the seamen; and he cannot discharge any of them during the voyage, unless for misconduct amounting to mutiny or general disobedience of orders. And that the contract of merchant seamen may not interfere with the public service, it is expressly provided by the statute, that an impressed sailor shall be entitled to his wages up to the time of

his impressment, if the ship earn freight; and that entering into the king's service shall not be deemed a breach of articles.

Of Merchant Shipping and Seamen.

Of the wages of the Seamen.

23. As the wages of a seaman are not due till the completion of the voyage, and a voyage frequently consists of several parts, there is sometimes a difficulty to determine, whether a seaman be entitled to his wages for any part, where the whole has not been safely concluded. The principle is this; the general rule of law being that freight is the mother of wages, the seamen are to be deemed to have earned their wages in all cases in which the vessel has earned its freight: If a voyage, therefore, consist of parts, such as an outward and homeward voyage, or several parts successively, the freight for each part being due when it is finished, the wages for that part would likewise be due, unless (as is usually the case) the contract stipulates for all the parts as for one voyage.

24. In the case of capture and re-capture, if the seaman continue on board, and complete the voyage, so that freight be earned, he is entitled to his wages during the whole time. And as a precautionary embargo is not a capture, seamen violently detained by an embargo, and *separated from the ship*, but afterwards restored, and navigating the ship home, are entitled to their wages during the whole of their detention; the ship having earned her freight.

25. As the master by the articles has hired *all* the service of a seaman, the seaman cannot claim any

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extra remuneration, even though the master may have promised it, such seaman having nothing to give, to which the master was not before entitled. Therefore, where a master in a storm promised an extra reward to his crew for doing their duty, the court decided that such promise could not be enforced. So far as respects the earning of wages.

Of the wages of the Seamen.

26. As respects the payment of seamen's wages, the rule is, that the seamen, with the exception of the master only, have a three-fold remedy for their wages, against the ship, against the owners, or against the master. The master's contract is personal with the owners; and he must, therefore, bring his action in the Court of Common Law. He cannot sue in the Admiralty Courts with the seamen, nor has he any lien on the ship for his wages or disbursements; he trusts his owners, and must look to them personally. But the seamen, either singly or altogether, may sue in the Court of Admiralty; and may arrest the ship by the process of that court, as a security for their demand, or may cite the master or owners personally to answer them. But if the seamen be hired by *deed,* and with special conditions; that is, not in substance the same with the articles in common use; in such case, as the fact of such deed, if denied, cannot be tried in the Court of Admiralty, the action must be in the Courts of Common Law. But if the deed have no special conditions, the circumstance of its being a deed, that is, having a seal, will not take away the jurisdiction of the Admiralty; and the wages may be recovered, as above said, by the arrest of the ship. [1]

Of Merchant Shipping and Seamen.

27. The Court of Admiralty will give its aid in the same manner, namely, by the arrest of the ship, to foreign seamen in a British port; unless where the contract is of a nature specially referring to their own laws; and such law is not so set forth in the contract as to enable the court to judge upon the face of it.

Of the wages of the Seamen.

28. The wages of seamen take precedence of all other demands, and are the most sacred of all liens. But actions for such wages must be commenced within six years after the cause of such action shall accrue, unless those impediments exist which in other cases take a demand out of the statute of limitations;—such as, minority, lunacy, captivity, or absence beyond seas. If the agreement be by deed, the demand may of course be made within twenty years. The form of action is by assumpsit, or action of debt, or (in the case of a deed) by debt or covenant. The master, though a servant of the owners, has a distinct interest from them; and, therefore, may be a witness either for the owners or sailors. And if the articles are wanting, the seamen may apply to a Judge for an order to the master or owner to produce them. And a seaman, when plaintiff, cannot be nonsuited for not producing the articles.

29. By a very recent act,(*d*) some facilities are given to seamen for the recovery of their wages. In all cases, where the wages do not exceed twenty pounds, they may apply to a justice of the peace,

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(*d*) 59 Geo. III. c. 58. and Part II. c. 5. p. 468.

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who, upon a due hearing, may thereupon issue an order to the master and owner for immediate payment; and, in case of their disobedience, may levy such money by distress. And the determination of the justice or justices is to be final, unless an appeal be interposed by either party to the High Court of Admiralty within the space of seven days after the order made.

Such are the principal rules of law as respect the ship, the master, and seamen, absolutely considered; that is to say, without reference to any contract respecting the ship, or her employment by the merchant. And this leads us to a brief review of our third and last part. (*e*)

III. Of Maritime Contracts.

Introduction to Part III. Of Maritime Contracts.

IN the Third Part of this Work are discussed those maritime contracts, under which the ship is employed by the merchant, and the rights and duties of owners on the one part, and merchants on the other, by virtue of such agreements. (*f*) The

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(*e*) Chapters 6 and 7. Part II. relate to Pilots and Convoys, of which it will not be necessary to say any thing in the present Introduction. For the law and decisions on these subjects, the reader is referred to the body of the Work, pp. 470 to 495.

(*f*) The third part of this Treatise consists of nine chapters, in which the following subjects are treated upon in their order:—Chap. 1. On Charter-Parties. Chap. 2. On Bills of Lading. Chap. 3. On the Covenants in Charter-parties; the Seaworthiness of the Ship; the Loading, Voyage, and Delivery. Chap. 4. Exceptions in the

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contracts by which ships are employed are Charter-parties and Bills of Lading; the duties of owners under such contracts are a due and careful loading, voyage, and delivery; and the duties of merchants are to pay such freight as may be owing under their contract, and such demurrage, salvage, and general average, as the occasion of the voyage may produce. Under this consideration of our subject matter, it distinguishes itself into the five heads of, 1. Charter-parties, and Bills of Lading, 2. Demurrage, 3. Freight, 4. General Average, and, 5. Salvage. To which may be added, from its important use and frequent occurrence, 6. The right of the unpaid consignor to stop *in transitu.*

And, First, of Charter-parties and Bills of Lading.

Of Charter-parties.

1. A charter-party is a contract for the letting to freight the whole or part of a ship, for one or more voyages. It is so called from the ancient practice of having such deed divided longitudinally into two parts, along an indented line drawn through the middle of the writing, one of which parts was given to the owner, and the other to the merchant. Such charter-party is universally in writing: but it is immaterial whether it be by instrument under seal, or by writing only. If by deed, it is either by a deed *inter partes,* or a deed-poll. A deed *inter*

Charter-party, and limitation of the liability of owners and masters. Chap. 5. Of Primage, Privilege, Average, and Passengers. Chap. 6. Of Freight. Chap. 7. Of General Average. Chap. 8. Of Stoppage in Transitu. And Chap. 9. Of Salvage.

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partes binds only the parties to the deed, and covenants or grants only as respects them. But a deed-poll may make a grant to any one, though not a party to it. But the owner, though not a party to a deed *inter partes* between the master and the merchant, may sue upon the covenants expressed to be made for his account by the master; the distinction being, that he is a party to the covenants of the deed, though not to the obligation. In home ports, the charter-parties are usually made between the owner and merchant; in foreign ports, between the master and merchant. In the latter case, the contract is seldom under seal.

Of Charter-parties.

2. The formal parts of a charter-party are the following: 1. The premises, which specify the parties to the deed; their character as master, owner, and merchant; the name, burthen, and tonnage of the vessel; and its situation at the time it is chartered. 2. The letting of the ship for the voyage or voyages; and the freight, whether it be a gross sum for the whole voyage, or so much for any division of time or tonnage, or bale of goods. 3. The stipulations on the part of the owner or master for the seaworthiness and due appointment of the ship in all necessaries for the voyage; for the due lading, departure, and delivery at the destined port, certain perils and accidents excepted. 4. The stipulations of the merchant, that he will furnish a cargo, and will unload the goods within a reasonable time, and pay the freight and demurrage agreed upon. 5. The penal clause, by which the parties bind themselves in a specified penalty for the faithful performance of their respective covenants.

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Of Charter-parties.

3. The principal questions under charter-parties, and the main source of all the cases, arise under the heads of the duties of the master and owner by virtue of such deeds; the restrictions and exceptions to their liability, and the degree in which their service is affected by an imperfect performance of the voyage agreed upon, or goods carried. As respects the duties of the master and owner under the charter-party, they are contained either in the express terms of the charter-party; or, at least, are immediately deducible as necessary consequences from them. These duties distribute themselves under the four divisions, of the seaworthiness and due appointment of the ship; the loading; the voyage; and the delivery.

4. As regards the seaworthiness and due appointment of the ship in all necessaries, the stipulation is, that the ship shall be tight, staunch, and strong; sufficiently manned; and every way fitted for the voyage. This covenant comprehends not only the hull, rigging, stores, and crew, but all the necessary papers, of which the ship must be possessed to be allowed to enter the port of destination; such as bills of health, &c. And as respects the crew, they must not only be sufficient in number, but in skill; the captain must be duly qualified; and so must the seamen. And as the seaworthiness of the ship is a common law duty, the law will not allow it to be indirectly and consequentially diminished and reduced by any of those precautionary notices and restrictions of liability, which have become too common amongst land-carriers. In such cases, the courts will hold that the common law duty is a preliminary and almost indis-

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pensable engagement; and that the precautionary notice must be regarded as applying to some other liabilities; a principle which some recent decisions have very wisely extended into cases of carriers by land.

Of Charter-parties.

5. As respects the loading of the vessel, it is the duty of the master to receive his lading according to the custom of the particular place; sometimes from the wharf; sometimes from the beach; sometimes from the craft at the vessel's side The master is responsible for theft and robbery whilst in port; the sole custody being necessarily in him, as the goods are out of the dominion of the freighters. The due lading likewise includes proper stowage, packing, &c. according to the custom of the port, the course of business, and the usage of the sea-trade.

6. As regards the voyage, the master is bound to use proper expedition, and not to deviate or delay. But a deviation for the repairs of the ship, or necessary refuge from the perils of the sea or enemy, is of course not only an excuse, but a duty. He must likewise take proper care of the cargo during the voyage, and is responsible for all injuries within his means of prevention; for injury by vermin for example, unless he shall have taken all due care to extirpate them. In the same manner, he is answerable for goods stolen and embezzled. In short, for any damage or injury arising from negligence, or absence of due skill. (*g*)

(*g*) For the restrictions and modifications of the liability of owners and masters, see Vol. II. Part III. c. 4. p. 105.

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Of Charter-parties.

7. As respects the delivery, the master is bound to take the same care in the delivery of the cargo, as in receiving it on board. He is not bound to part with the goods till the payment of the freight: and therefore, if he have reasonable cause to doubt the solvency of the assigns of the cargo, it is his duty to retain the goods till payment, if payment is to be received by *him* from *them*. But as much inconvenience would ensue from the delay of the ship, the usage is, that he may in such case land the goods in some public dock or wharf; and there give them in custody to the wharfinger or dock-keeper, with an order not to part with them till the payment of the freight. The lien is then continued in the master and owners through the custody and possession of the wharfinger as his agent. In the same manner, if goods on board of ship are taken out of the ship *invito* the master, and by compulsion of law, or the authority of an act of parliament, the lien will be preserved in the *place*, and in the *hands*, where the law has deposited them. This holds in the case of goods landed to secure the duties in the public docks of the London and West-India Companies. The master's responsibility continues till the goods are delivered to the consignee, according to the ordinary usage of the trade, or the custom of the voyage; that is, either to his wharfinger or his servants, either in boats or on land. Such are the general duties of masters and owners under charter-parties. (*h*)

(*h*) But goods landed in the public docks, by virtue of an act of parliament, are at the risk of the owners, and not at the risk either of the master or of the dock company.

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Of Charter-parties.

8. As regards the exceptions to charter-parties, or the restriction upon these duties, such exceptions are made partly by an express clause in the charter-party or bill of lading, and partly by certain acts of parliament, which have been passed to limit the common law liability of masters and owners as carriers by sea. The exception by clause in the charter-party usually runs in these words:—That the master will make right and true delivery, " the act of God, and the king's enemies; the dangers and accidents of the seas, rivers, and navigation; the restraints and detention of kings, rulers, and republics; and all and every other *unavoidable* dangers and accidents excepted." The act of God here comprehends all sudden accidents, such as lightning, earthquakes, hurricanes, &c. perils of the seas, and all such accidents as arise from the sea and winds; such as wreck, stranding, collision of vessels with each other; leakage from rough seas; in a word, all such accidents as may arise from the elements, and which cannot be prevented or avoided by any due care, vigilance, or skill of the master and mariners; and are in no degree occasioned by ignorance, neglect, or wilfulness. But destruction of a vessel by worms or vermin is no peril of the sea. Robbery by pirates is a peril of the sea; and so, likewise, the robbery of goods landed in the case of wreck. And it is to be further observed of this exceptive clause, that it exempts the master and owners from liability in damages for the *non-performance* only, and in no case supplies the place of *actual* performance; and, therefore, where the accidents and perils of the sea have prevented the performance of the specific service,

this clause will not operate to entitle the owner to the freight where the service has not been rendered; but only to excuse him from liability in damages for the part unperformed. But where the cargo has been brought home, but much damaged by the sea, such damage by sea will not be deemed any non-performance of the service; but a damage from one of those accidents which is covered by the clause of exceptions. On the other hand, if the vessel be compelled to return without reaching her destined port, it is a non-performance of the voyage; and though the exceptive clause may exempt the masters and owners from any liability in damages, it gives them no claim for any freight.

9. And this leads us to the last and principal consideration in the nature of charter-parties, namely, the degree in which the service actually rendered is affected by the non-performance of the whole voyage agreed upon. This accident, of such frequent occurrence, seems to distribute itself into three main forms; first, the non-conclusion of the voyage agreed upon; secondly, its actual conclusion, but with the omission of some of the conditions stipulated; and, thirdly, the complete performance of the voyage and its conditions, but with the cargo damaged or spoiled so as to render the voyage nearly or totally without benefit to the merchant.

10. As respects the first of these points, the non-performance of the whole voyage, the rule of law is; that as a man may contract for what he pleases, and to what extent he pleases, within lawful subject matter,

Of Maritime Contracts.
Of Charter-parties.

so he shall be holden bound to execute his contract in the stipulated extent; and, therefore, if he have rendered his contract a wager or venture; if he have made it in the proverbial but expressive terms *no cure no pay;* (that is, if there be no conclusion of the whole service agreed for, then there shall be no payment for the part executed,) in such case he shall be bound by his covenants, and their legal import. If a master or owner, therefore, make any specific covenant, he is bound to the performance against all excuses. He must either perform, or satisfy the breach; or (where the defect is the conclusion of some whole voyage or service,) he can claim no remuneration for the part actually performed. And where the contract undertakes for some specific thing, and contains no exception, the law will always give it the construction,—that the party, so absolutely contracting, intended to bind himself against all events; and, therefore, must lose the consideration, or satisfy in damages according to the nature of the engagement. This is the rule of specific covenants.

11. As to the second point, namely, the actual conclusion of the voyage agreed upon, but with the omission of some of the conditions, the question in such cases is, whether the condition unperformed be a condition precedent, or subsequent and independent. The distinction is, where the condition goes to the whole consideration of the contract, or where it affects it only partially. Where the condition goes only to a part of the consideration, and a breach may be compensated in damages *pro ratâ,* such condition is only a condition independent or subsequent, and

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the party injured must seek his remedy on the covenant. But where the non-performance of any condition totally alters the nature and quality of the service, and renders it a different thing from the subject agreed for, then such condition is precedent, and the non-performance or breach annuls the contract. The reader will find these distinctions explained at length in the chapters on Charter-parties and Freight in the body of the Work. The above is merely the substance of the general rule as respects conditions precedent and independent in charter-parties.

Of Charter-parties.

12. As regards the last point, the full completion of the voyage and its conditions, but accompanied with the damage of the cargo; the general rule here is, that as the owners have performed the service, they are entitled to their freight; and if the freighter have sustained an injury, he shall be compensated in damages by a cross action. And upon this principle, in a recent action for the freight of a cargo of fish totally spoiled, the late Lord Ellenborough decided, that the owner was entitled to recover for the freight, and that the freighter must bring his cross action for the damages, but could not withhold the payment of freight. But if a master be commissioned to bring one thing, and bring another; or to go to one port, and go to another; or generally to execute a service in one way, and execute it in another; it is no performance of the contract; and, therefore, nothing is due for it under the contract.

Of Maritime Contracts.

As respects bills of lading.

Of Bills of Lading.

13. As charter-parties are the instruments by which ships are let; so bills of lading are nothing but the formal receipts and acknowledgments by the master that he has received such goods on board on account of the freighters; and will deliver them to their order or assigns, with an exception only of accidents by the act of God, king's enemies, &c. as by charter-parties.(*i*) When a ship is hired by charter-party, such bill of lading is given by the master to the merchant freighter. When goods are sent by a general ship, that is to say, without any charter-party, but as goods are sent by a land carrier, such bill of lading is likewise given by the master to the several freighters. In both cases, therefore, it is the title and document of the goods sent; and, as such, is transferable in the market. There are commonly three bills of lading; one for the freighter; another for the consignee, factor, or agent abroad; and a third is usually kept by the master for his own use.

14. It will be seen in the body of the Work (*j*) that when goods are shipped to be carried abroad by a merchant resident in this country, or are sent from one part of the kingdom to another, the persons to whom they are sent must necessarily be in one of the three relations to the merchant by whom they are transmitted. They may be buyers; they may be his correspondents or consignees, with mutual dealings;

(*h*) As to the extent of the exceptive clause, see Vol. II. Part III. ch. 4. p. 111.

(*j*) Vide Vol. II. page 59.

Of Maritime Contracts.

Of Bills of Lading.

or they may be merely his factors, agents, or brokers; and in the latter character, having given no value for the cargo, are only his agents for the sale of it. But under all these cases, a *boná fide* holder of a bill of lading, derived from the indorsement of any of them, is entitled to the cargo; and may claim it from the master, if he can prove that he has purchased it for a good consideration. The transferable nature of bills of lading puts them within the analogy of bills of exchange; and being within the reason of them, they have this main property of bills of exchange; that the indorsee of a bill of lading for a valuable consideration has not to look to the title of the indorser: And, therefore, if a factor make an absolute indorsement of a bill of lading for a *boná fide* consideration, such indorsement will be good to pass the property, though the property should be at sea at the time, or the factor should afterwards embezzle the amount, and have acted dishonestly as respects his principal. For factors are the servants and trusted agents of their principals; and upon all mercantile principles their acts within their implied commission bind their consignors; and any sale by them, being a sale by those commissioned to sell, must in all ordinary circumstances be valid and absolute.

15. The equitable right of a creditor, or of a correspondent with mutual dealings, is effectually as good as that of a purchaser; and, therefore, the law regards it with the same favour. Upon this principle, the indorsement and delivery of a bill of lading to a creditor conveys the property in the goods from the time of the delivery. And it conveys it much more

Of Maritime Contracts.

largely than an original purchase upon credit. In the case of a purchase upon credit; that is, by bills of exchange or open credit, the property may be stopped *in transitu* by an unpaid consignor, in case the bills should turn out worthless before the ultimate delivery of the goods. But, in case of an indorsement to a creditor, the consignor, except in very particular circumstances, such as fraud, cannot stop *in transitu,* as the Court will hold such a previous debt to be equivalent to an actual payment. (*k*)

Of Bills of Lading.

16. But though a factor may indorse a bill of lading, and such indorsement will be effectual, a factor cannot pledge a bill of lading: the distinction being, that he is a servant commissioned to sell, but not to pledge. For the benefit of general commerce, and in order to give a necessary efficacy to the acts of a factor, the law makes an indorsement and sale by him in all cases effectual; and therein exempts him from the general rule, that those cannot convey a property who have it not in themselves. This power of a factor indeed rests upon the expediency of it; first, as it is a consequence of the relation of agent and principal; and secondly, from the necessity of such powers for the purposes of trade and commerce. But neither of these reasons applies to the case of the pledge of goods by a factor. It is neither within his understood commission, as an agent; nor is it necessary for the general purposes of commerce. But where principals permit their factors to exhibit themselves as the owners of

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(*k*) See Part III. c. 2. p. 63.

property, the right of the factor is extended to an absolute dominion.

Of Maritime Contracts.

17. But an indorsement of a bill of lading by a factor must necessarily be for good consideration and *bonâ fide;* and, therefore, if it be known to the indorsee that the factor is doing an unauthorised act; or if the factor himself shall acknowledge to him that he is making such indorsement upon his own account, and intends, or expects, to indemnify his principal from some other means; in a word, if there be any fraud or notice to the indorsee,—in all such cases, the fraud of the factor being known to the assignee renders the indorsement a fraudulent act, and of course a void contract. Upon the same principle, if any condition be expressed in a bill of lading, so that the bill carries a notice of its limitation upon the face of itself, there the indorsee must take such bill of lading subject to the qualifications expressed.

Of Bills of Lading.

Such is the nature of charter-parties and bills of lading, and such their leading principles.

SECONDLY, Of Demurrage. (*l*)

1. Demurrage is the compensation due to a shipowner by a freighter, for delaying his vessel beyond the time expressed in the charter-party or bill of lading. Demurrage, in fact, is nothing more than an extended freight. It is unnecessary to say any thing of the principle upon which it rests; it being an

Of Demurrage.

(*l*) Part III. c. 1. p. 13.

Of Maritime Contracts.

obvious legal right, that such extra service should receive a proportionate remuneration.

Of Demurrage.

2. As to the occasion under which such demurrage may be claimed, it is one of those obligations which arises as frequently from the mere casualty of the merchant, as from his misconduct, negligence, or wilful delay. The general rule is, that all delay from the casualties of the voyage, that is, between port and port, belong to the ship and owner; and that all delays at the port, from whatever cause, the ship being there, and ready to receive or deliver her cargo, belong to the merchant. Upon this principle, if the vessel be delayed by the crowded state of the docks or river, the merchant, though not in fault, must pay demurrage for such delay. In the same manner, if the vessel be frozen in a port or a river, whilst delivering her cargo. In the same manner, if there be any delay in unloading, from whatever cause, such as an hindrance by custom-house officers, or the want of some necessary papers which it is the duty of the merchant to provide.

3. The greater number of charter-parties express the time to be allowed for unloading the ship in one of the three following modes: 1. That the merchant shall be allowed so many specified days for loading and unloading; and so many further days, for which the freighter, if he detain the vessel, shall pay at the rate of so much per day demurrage. 2. That the ship shall be unloaded and discharged within the usual and customary time of ships in the port of delivery and discharge; or, simply, within the usual

and customary time, &c. 3. In some charter-parties no stipulated time whatever is mentioned, nor any general terms, such as "within the usual and customary time of unlading at the port of discharge," or "within a reasonable time," or words of the like import.

Of Maritime Contracts.

Of Demurrage.

4. Under charter-parties of the first description, namely, where a certain number of days is allowed in the first instance, and so many further days, for which demurrage is to be paid, at a certain rate *per diem*, there is no difficulty; as the demurrage in such cases will be due according to the delay, and at the rate expressed. If the vessel be delayed beyond the "further days" mentioned, the rate of demurrage will still be *primâ facie* what is expressed in the charter-party for the days mentioned. But as the parties have not specifically agreed for this extra time (namely, the time after the "further days,") it will be open to the ship-owner to shew that he has sustained more damage, and to the freighter to shew that there has been less.

5. Under charter-parties of the second description, that is to say, where it is stipulated that the ship shall be unloaded and discharged within the usual and customary time, or within a reasonable time; there the freighter will not be liable for any delay, which may arise from the ordinary course of business in the port or custom-house of the place of discharge. But any unusual delay will constitute demurrage under charter-parties so constructed; the stipulation only being, that the usual customary or reasonable

Of Maritime Contracts.

time should be allowed. The term reasonable will be considered as only a synonymous adjunct of the terms usual and customary, and will not cover any casualty which does not belong to the ordinary course of business.

Of Demurrage.

6. Under charter-parties of the third description, namely, where no time is stipulated for the vessels to discharge, nor any general terms employed, such as "within the usual customary and reasonable time;" the implied contract on the part of the freighter will be taken to be, that he will discharge the ship in the usual and customary time for unloading such a cargo. But the limitation abovementioned must be here likewise understood, namely, that any casualty, not in the usual course of business, such as being frozen in the river, being detained by the officers of the customs, or having to wait for papers or licences belonging to the cargo, is not comprehended within the terms,—of usual, customary, and reasonable time.

7. As the accidents of the winds and seas belong to the ship and owner, no demurrage of course can be claimed of the freighter for delay under causes of this kind. Upon the same principle, he is not liable for delay occasioned by waiting for convoy, by hostile detention, or capture and re-capture. If the act of God happen upon the seas, it is the incident of the ship and owner; and the freighter is not liable for the delay. If it happen in the port, whilst *loading or unloading*, for example, as abovementioned in the case of being frozen in, &c. it is the casualty of the freighter.

Of Maritime Contracts.

8. Freighters under bills of lading are subject to the same demurrage as freighters under charter-parties, where the claim for demurrage arises on the contract; and, therefore, if the cargo or goods be not taken out in time, the holders of bills of lading will be liable *pro ratâ* for the delay. Nor is it necessary that the master should give notice to such freighters of the arrival of his ship; the bill of lading being a sufficient notice to them, and the arrival of ships being matter of public notoriety.

Thirdly, Of Freight.

Of Freight.

1. Freight is the compensation to the owner for the hire of his ship, in part or whole. It is sometimes due in whole, and sometimes only in part: but in all cases the owner, or master, whilst in possession of the goods, and provided that he has made no contract inconsistent with such right, has his lien for the freight due. Under this consideration, freight is divided into the four heads: 1. The cases in which the entire freight is due; 2. In what cases part only can be claimed; 3. By whom payable; and, 4. Of the lien for freight, and the action which may be maintained for it.

2. As to the cases in which the whole freight is due, the doctrine of whole and part freight rests entirely upon the following principle; which, for the sake of order, is here repeated from the 133d page of the third part of this work. (*m*) In order to explain the

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(*m*) Part III. c. 6. p. 133. In which all the cases on this subject are considered.

Of Maritime Contracts.
Of Freight.

principle upon which the law of these cases rests, it may be useful to observe, that the labour or service rendered, for hire, by one man to another, is necessarily one of two descriptions: either it is beneficial to the hirer, *pro ratâ,* in such part of it as may have been done; or it is totally fruitless, and without benefit to him, unless the whole service be completed. If a builder, for example, be employed to build a house, but by some accident, or his own wilfulness, should leave the work when he has only completed three parts of it, such three parts of it are manifestly of proportionate value to his employers; he may accordingly recover *pro ratâ* for the work done, although he has not completed it. But if a person contract with a carrier or messenger, that a package shall be delivered to some distant correspondent, and such carrier or messenger go only part of the way, or from error, or some other cause, return without the due delivery of the package, it is here manifest that the service is wholly useless, and without benefit to his employer; and that, in not having done all, he has in fact done nothing. In this latter case, therefore, as no service has been rendered, there is neither a legal nor equitable claim for any remuneration; the express contract of the employer being, that he would only pay for the performance of the service, and there manifestly being no implied contract that he should pay for that from which he derives no benefit.

3. The contract for the conveyance of merchandize is, therefore, in its nature an entire contract of this kind; and, accordingly, unless it be completely performed by the delivery of the goods at the place

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of destination, the merchant is not bound to pay freight, because he has derived no benefit from the time and labour employed in a partial conveyance. This is the general principle, and the reason of it; and, if there be some exceptions to the rule, they will be found to rest upon the peculiar equity of the cases in which they occur.

Of Freight.

4. Upon the above principle, if the ship be captured, the owners of course lose their freight, as well as the merchants their goods. But if the vessel be re-captured, and proceed afterwards with the cargo to the place of destination, the right to freight revives, and becomes due upon the completion of the voyage. The same rule extends to a resumption of an interrupted voyage, after the removal of an embargo by which it has been suspended. It may, therefore, be assumed as a general rule, that the whole freight is due, where the whole voyage is performed; but that, if the complete service be not rendered, no freight is due and recoverable, unless the completion of the voyage be prevented by the freighter's own act, or with his consent, by himself or agents:—Or unless he dispense with the completion of the voyage; or unless the part performance be proportionately beneficial, and the engagement for the *whole service* be not so specific as to exclude all merit from the part performance.

5. And these exceptions introduce us to the second division of freight; that is, where freight *pro ratâ* is due. Now the general rule under this head is; that the imperfect performance of the voyage or service

Of Maritime Contracts.
Of Freight.

can only be cured by the acceptance of the merchant, and by his express or implied dispensation with the defective performance, and, therein, his new implied contract to pay *pro ratâ* for the goods and service which he has submitted to receive, such as it is. If the vessel be wrecked, and the goods saved; or if the vessel be unable to conclude her voyage; it is the duty of the owners to tranship the goods, if they possibly can, and send them onward to the port of destination. If they cannot do this, they must apply to the merchant to receive them where they are. If the merchant consent to receive them, the owners will then be entitled to freight *pro ratâ.* But they are not entitled to this freight under the original charter-party; for under their deed they can claim nothing, because in not performing the whole service they have not complied with its specific engagement; and because the exception as to the perils of the seas in the charter-party operates only to relieve them from satisfying any damage by sea, &c. but is not such a substitution for actual performance, as to entitle them to freight. The owners, therefore, must be entitled to freight *pro ratâ* under the new contract implied in the acceptance of the goods by the merchant. But if the merchant refuse to accept, or rather to dispense with the completion of the voyage, then the owners must lose their freight: but the merchant must still have his goods, they being his own wherever they may be.

6. But this rule admits exceptions according to the equity of the case. The first class of exceptions comprehends those cases in which the service is in

Of Maritime Contracts. Of Freight.

its nature divisible, and where even a partial performance is proportionably beneficial to the freighter. Thus the partial freight will be due when the ship has performed the whole voyage, although she have brought a part only of the merchant's goods in safety to the place of destination ; as where, for example, sixty bales are delivered out of an hundred, under which circumstance it is manifest that the freighter has received a proportionate beneficial service, for which he must pay accordingly ; and, on the other hand, have his action against the owner or master, (if the cause of loss admit it) for the bales undelivered.

7. Where the defective performance is not in the part of a voyage, but in the omission or imperfect execution of some condition, or in the improper performance of the service altogether ; the courts of law, as we have observed under a previous head, will take the distinction, whether such condition be precedent, or subsequent and independent ; that is to say, whether it extend to the root of the consideration, or only affects and diminishes the value of the service. But where the engagement is for one express and specific service, and such service be not rendered, there freight *pro ratâ* can never become due except by a new agreement, implied by the merchant in the acceptance of the goods.

8. Where the whole voyage is performed, and only part of the goods brought, a distinction must be taken whether the ship be a general ship, or hired by charter-party. If a general ship, the freight will

Of Maritime Contracts. Of Freight.

be due for the part brought, and the freighter may have an action against the master for the part lost or left behind. But if the ship be a chartered ship, and the charter-party be in the usual terms, it may become doubtful whether the bringing of the part of the goods be more than equivalent to the performance of part of the voyage; and not being a specific performance, whether any freight can be claimed for the part brought. So hard a case, perhaps, cannot easily arise; but if it should, the only remedy on the part of the master would be either to procure the acceptance of the goods brought by the merchant; or to deposit them in some public dock or warehouse until he bring the remainder. If the engagement be specific, that such a cargo shall be brought, it would seem that the owner can have no claim to any freight whatever, unless the whole be brought.

9. As to the parties entitled to freight, the customary rule is, that the action must, in general, be brought by and against the person with whom the contract is made. If there be a contract of charter-party under seal, the parties to the deed must sue and be sued. But if the contract be not under seal, and made with the master, the action may be brought either in the name of the master or the ship-owner. But where a contract under seal was made by the captain with the freighters on behalf of his owners, it has been decided that the owners cannot maintain assumpsit against them for freight; for the charter-party is conclusive, and the implied promise is merged in the specialty.

Of Maritime Contracts. Of Freight.

10. As respects the lien for freight, the general rule is, that the ship-owner has a lien for his freight as long as he retains possession of the goods; and even where the goods are taken from him by act of parliament, as by the London and West India dock acts, the law will preserve his lien for him in the place where the goods are deposited. The exceptions to this rule are principally two. The first is, that the freighter is regarded as having intentionally surrendered his lien, where he has made some special agreement for payment; as, for example, where he has received bills of exchange, or has engaged to take certain bills at the end of the voyage.

11. The second exception is, where the ship is let under a charter-party so constructed, that not merely the *space* of the ship, but the ship *itself*, is demised and let out to the merchant. In this case the ship-owner loses his lien, because he has in fact parted with the possession of his ship. And it will make no difference, in this respect, although the master and seamen left to navigate the ship be paid by the owner.

FOURTHLY. Of General Average. (*n*)

General Average.

1. General average is the apportionment of a particular loss in a sea-venture amongst the several parties to the venture in the proportion of their several shares of the ship or cargo saved; such loss having been incurred for the benefit and preservation of the

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(*n*) Part III. c. 7. p. 184. where all the cases are collected.

Of Maritime Contracts.

General Average.

whole. Its most usual form is that of *jettison*, or the throwing over board of a portion of the cargo, for the sake of lightening the ship in sea-peril.

2. As the equitable foundation of general average is, that the loss has been suffered by one and for the sake of the whole, or that one has made a sacrifice of more than his proportion for the common benefit; so the mere loss or damage of the ship by tempest and sea-peril is not a subject of general average. The reason is, that the damage of the ship belongs peculiarly to the owners; and it is a part of the understood contract between the freighter and owners, that such loss and damage shall be no part of the freighter's venture. The ship-owner is not to make good any loss or damage of the cargo by sea peril; and, upon a like principle, the freighter is not to contribute towards any loss or damage of the ship from the same cause.

3. Upon a similar principle, any damage to the ship by fighting off an enemy is not a subject of general average, it being the duty of the master to defend the ship: And, therefore, such defence being relevant to his own duty and interest, and not being any thing extraordinary done for the sake of the cargo, the owners are not entitled to an average contribution.

4. But, though the ship itself from the above causes is very seldom a subject for general average, it is manifest that cases do occur, in which owners may claim a general average for damage incurred by their vessel for the benefit of the cargo, as well as for

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General Average.

the ship. And one of these cases is, where the master, for the sake of preserving the cargo, has used and cut up some of his ship tackle or furniture, or voluntarily added to his number of seamen, or hired extra assistance for the preservation of the cargo, in some emergency not within the scope of any ordinary casualty.

5. If a ship be obliged, from whatever cause, for the safety of the whole concern, to return to port, whatever expences are absolutely essential to enable her to prosecute her voyage may be considered as general average: but if the ship, by such expenditure, gain a lasting benefit, there must be a deduction on that account of so much, which must be placed wholly to the ship-owner's account. Repairs, with the foregoing limitation, constitute a general average: so, likewise, the expences of unloading the cargo to make such repairs; but not the wages and provisions of the crew, recruiting them, or the like. Such repairs, however, must be merely such as are necessary to enable the ship to prosecute her voyage, and to keep the cargo from damage.

6. Upon these principles, therefore, three things are necessary to constitute any claim upon the ground of general average; first, that there should be a special sacrifice by one or more for the benefit of the whole; secondly, that it should be for the purpose, and with the intent, *(causâ et mente)* of the preservation of the common concern; thirdly, that the common concern should be benefitted by the partial sacrifice.

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General Average.

7. If a ship lose her masts by having them blown away, it is, as above said, no average. But if a mast be cut down, or any part of the cargo thrown overboard in order to save the rest, there will be a general average for the mast and the part so thrown away. Where the cargo is to be charged with general average, the cargo must have received some benefit. Thus where a ship, which has been damaged at sea so as to be unable to continue her voyage, puts into port to make the repairs *necessary to continue* her voyage, the cargo gains the prosecution of the voyage, and a further and stronger security against sea-damage, which would be most probable upon the ship's proceeding in a shattered state. And the ship, upon its own part, gains greater safety; but this is all it is entitled to gain. General average is here due upon the principle, that such repairs (within the limit only of what is necessary to continue the voyage) are a common benefit, and the means of common safety. A case of this kind would stand upon the same principle as the construction of a raft, or the purchase of another vessel, in the case of shipwreck, for carrying home the passengers and cargo, which of course would be a subject of common contribution.

FIFTHLY. Of Stoppage in Transitu. (*o*)

Stoppage *in transitu.*

1. Stoppage *in transitu* is a right, under which an unpaid vendor, and every one in the character of

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(*o*) Part III. c. 8. p. 200. where all the cases are collected and considered.

Of Maritime Contracts.

Stoppage *in transitu.*

a vendor, namely, a broker buying goods for another on commission, may exercise the power of stopping his goods upon the insolvency of the vendee; provided only that such stoppage be made before the goods have either actually been delivered, or something have been done on the part of the vendee, or his agents, which amounts to a constructive possession in law.

2. In considering this subject, it naturally distributes itself under the three heads; first, in what cases, and by what parties, goods may be stopped *in transitu;* secondly, what is a *transitus,* and how far it extends; and, thirdly, what defeats the right, and completes the possession of the vendee, though the goods should not have actually reached his hands. As to the first head, the general rule is, as above stated; that not only every unpaid consignor, but every one in the same equity of character, has the right to stop his goods *in transitu;* either in the event of the insolvency of the buyer, or upon a reasonable apprehension of it. The last limitation is necessary in order to distinguish this right from the power of rescinding the contract, which, after it has once been made, does not exist by the law of England without the consent of the parties.

3. Nor is this right of the unpaid consignor taken away either by a payment in bills, turning out to be worthless, before the delivery of the goods, or by a part payment of the price; as the law does not regard either of these circumstances to be such a conclusion of the sale and delivery to the vendee, as to

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Stoppage *in transitu.*

divest the right of the unsatisfied vendor to stop *in transitu.* Therefore, though the consignee may have paid for the cargo in bills of exchange, the consignor, upon the insolvency of the consignee, before the delivery, may stop it *in transitu,* the law regarding such bills as nothing; and, therefore, leaving the consignor in possession of his original rights.

4. As to the second head under stoppage *in transitu,* namely, how far the *transitus* extends and where it terminates, the general rule under this head is; that goods are to be deemed in transit so long as they remain in possession of the carrier, or of any agent of the carrier, or of any wharfinger, innkeeper, or any other servant of the public; or in any place of deposit connected with the transmission and delivery of goods; and, finally, until every thing be done (which is required or necessary to be done previously to the delivery, as weighing, sorting, &c.) by the vendee or his agents; and thenceforth, until they arrive at the actual or constructive possession of the vendee.

5. Upon the above principle, goods may not only be stopped whilst in the hands of the master, and on board the ship; but if he have landed them on any wharf, whence they are to be sent by the wharfinger to the consignee, the unpaid consignor may still stop them *in transitu,* although they may have been delivered to the wharfinger as the goods of the consignee.

6. Nor is the *transitus* determined by the deli-

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very of goods on board a chartered ship, unless where the ship is so completely out of the possession of the ship-owners, and so entirely in possession of the freighter, as to have become equivalent to his own vehicle or warehouse. But if the freighter or consignee be the mere chartered party of the whole *space* of the vessel, and not of the *hull* of the ship, that is, the ship not being demised and let out to the freighter as an *entirety*, but only occupied, as it were, by an universal bill of lading of the whole *capacity* of the ship, and the master and seamen remain servants in possession for the owners; there an unpaid consignor may always stop the goods in *transitu* on board such vessel.

Stoppage *in Transitu.*

7. Upon the principle that the *transitus* continues so long as any thing remains to be done by the vendor or his agents, an unpaid consignor may stop goods *in transitu*, where, after sale from the warehouse of his broker, the goods remain unweighed, unmesaured, or unsorted; if weighing, measuring, and sorting, be necessary to the execution and conclusion of the contract.

8. Nor will an unpaid consignor be divested of his right of stopping *in transitu* by any mistake of the master in delivering the goods, after timely notice by the vendor, that he intends to exercise the right of stoppage; nor by any fraudulent anticipation of the consignee, in taking possession of the cargo before its arrival. In the first case, the courts of law will hold the delivery to be no delivery, as being made under the mere mistake of the carrier. And

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in the second case, the courts will consider any anticipated possession of the cargo, at a port short of the port of destination, to be a surprise upon the consignor.

Stoppage *in Transitu.*

9. As to the third head of stoppage *in transitu,* namely, what shall defeat the right of an unpaid vendor to stop *in transitu ;* the general rule is, that not only the assignment of the bill of lading for a valuable consideration, but every act which amounts to a constructive possession, and is not meant to operate otherwise, such as a delivery of the goods to the consignee's agent, or servant, marking the goods, &c., will defeat the consignor's right of stopping *in transitu :* although the goods shall be still in actual passage, and may not have reached their port of destination.

10. Upon the above principle, if a consignee, having in possession a bill of lading, indorse it over to a third person for a valuable consideration, such indorsement will pass the goods to such third person ; and though the consignor be unpaid, and the consignee become bankrupt before the arrival of the goods, the right to stop *in transitu* is effectually gone; the transaction between the consignee and indorsee of the bill of lading being *bonâ fide.*

11. Upon the second qualification of the rule above stated, it is not necessary for the consignee to make an actual removal of the cargo in order to vest his possession, and to determine the right of stopping *in transitu.* If he take a constructive possession,

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such as putting his mark upon the goods, paying warehouse rent for them, or exercising any unequivocal act of dominion over them, it will be sufficient to render the delivery complete, and thereby to divest the right of the consignor to stop *in transitu*.

12. And as, from the nature of all contracts, an acceptance is necessary to complete and terminate the contract, and as the contract between consignor and consignee, so far as respects the right of stopping *in transitu*, is presumed by law to be suspended till a complete delivery; so a vendee, who may find himself in embarrassed circumstances at the time of arrival, may waive the acceptance of the goods, and leave them for the consignor.

Lastly, Of Salvage.

Of Salvage.

1. Salvage is the compensation payable by merchants and ship-owners to those who may have saved their ship and cargo from wreck or capture, The right to such compensation is founded in law upon the two principles; first, that every one has a just claim to be paid for his labour in the service of another; and that the rate should have a due relation, not only to the *quantum* of the labour, but likewise to its quality; that is to say, whether labour of body or labour of mind, or of both jointly; and whether mere service, or service accompanied with danger, enterprise, and skill. The second principle is, that salvors of this kind ought to be encouraged by liberal rewards, from a just regard to the maritime interests of the country, and in order that ships and their cargoes,

and more particularly human lives, may be saved from perishing.

Of Salvage.

2. As the occasions for the exercise of salvage are chiefly two, namely, wreck and capture, the subject of salvage naturally divides itself, and is accordingly treated by all maritime writers, under the two corresponding heads, of salvage in case of wreck, and salvage in case of capture.

3. As to salvage in case of wreck, it admits in practice of an important subdivision into two cases: the first, where the wreck or danger is on the shore, or at least immediately off the coast; and the second, where the wreck or danger occurs in mid-sea, and the vessel is saved by the crew of some other vessel.

4. In the first of these cases, salvage is given by several acts of parliament, the enactments of which will be found in the third part of the work under the head Salvage. (*n*) It is sufficient to observe in this place, that by virtue of these acts all sheriffs, justices of the peace, constables, custom-house officers, and commanders of king's ships, are directed to give ready and immediate assistance, in case of wrecks or danger off the coast; and that a reasonable reward, to be adjusted by three justices, shall be paid to any and all persons so rendering their assistance in the event of the preservation of the ship or cargo, or, proportionately, for any part of either.

(*n*) Vol. II. Part III. c. 9. p. 231. where all the cases are stated and examined.

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Of Salvage.

5. In salvage in the case of wreck or danger in the mid-sea, if the parties cannot agree amongst themselves as to the compensation to be made, the salvors may apply to the Court of Admiralty; who, upon a due enquiry into all the particulars, will make a decree according to the circumstances of the case. In a case of a derelict, where the danger is inconsiderable, and the abandonment has been injudicious, the court will generally give about two-fifths of the value of the ship and cargo saved. In a case of greater danger, the same court has sometime given as much as two-thirds. But it is a rule with this court to be liberal in cases of this kind, as the danger is usually extreme, and the relief nearly hopeless. The general rule on this subject is, that the rate of salvage on derelict is discretionary by the modern practice in the Admiralty courts; the ancient rule of giving a moiety *de jure* to the salvors being overruled by later practice.

6. As respects crews and passengers, they can in no case be either salvors, or joint-salvors. The crew cannot have any claim to salvage, because it is their duty to protect the ship and cargo through all perils; and the whole of their service is engaged to the master and owners. The same reason extends in a great degree to passengers, who share the peril, and must share the duty. But if a passenger exceed what may fairly and reasonably be expected of him, as his portion of common labour to a common peril and its consequences, he may, under such circumstances, become entitled to a reward in the nature of salvage; and the court will grant it liberally.

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Of Salvage.

7. As to the persons who are to contribute to salvage, the reward must be paid by those who receive the benefit of the service. Salvage is a compensation to the sailors, not merely for the restitution of the property which has been made by them to the prior owners, (for that is properly an act of mere justice on their part,) but for the risk and hazard incurred by them, and for the beneficial service they have rendered the former owners in rescuing their property from the danger in which it has been involved. The persons, therefore, to contribute to salvage, are the persons who would have borne the loss had there been no such rescue, and who of course reap the benefit of such rescue. But salvage must not be confounded with mere acts of pilotage.

8. As to the second case of salvage, namely, salvage in the case of capture and re-capture, the rate of salvage to be paid to the captors is settled by certain acts of parliament passed for that purpose; the principal of which is, the 48 Geo. III. c. 132. In the third part of our Work, and under the Chapter on Salvage, the several provisions, and the cases which have arisen under them, will be found duly arranged and explained. It will be sufficient to observe in this summary, that the rate of salvage in the case of capture and re-capture, as fixed by acts of parliament, is one-eighth part of the value of the ship and cargo, in the case of such re-capture being made by a king's ship; and one-sixth part of the value of ship and cargo, if such re-capture be made by a privateer.

9. It is a principle, that in the case of one vessel

Of Salvage.

saved by another, the master and crew are strictly the only salvors. The owners claim only under the equitable consideration of the court, for the risk of their vessel, &c.; and the court is not disposed to allow their claim to any great amount.

10. If a ship captured by the enemy be voluntarily abandoned by him at sea, after taking out the crew, either because he may be unable, or may not think it worth while to carry her into port: and she be found, and taken possession of, by a British ship of war; this is not a re-capture within the act of Parliament; and the Court of Admiralty is not restricted as to the rate of salvage, but may apportion it to the nature and merits of the case.

Conclusion of the Introduction.

Such is the general system of our Shipping and Navigation Laws, and the Maritime Contracts to which they give occasion. It may be justly observed that the basis, and, as it were, the great charter of the whole system, are the Navigation Laws; and that the Registry acts, and the regulations of merchant shipping, are only to be valued, as their aim is to uphold and enforce these admirable institutions. The Navigation Act, in like manner with many of our laws of constitutional liberty, arose in times of popular commotion; and, from the effect of political causes, was the source of many bloody wars with our maritime rivals, the Dutch. But succeeding kings and parliaments, acknowledging its wisdom, and respecting the patriotic spirit in which it origi-

Conclusion of the Introduction.

nated, have considered it no less a measure of good policy, than a proper maintenance of the popular interests, to give it upon every suitable occasion a larger compass and a firmer root; and so to direct and guide its growth into our system, that it might be sustained by one common trunk, and supported by intertwining its branches with the spreading tree of British liberty.

Having now executed a summary, which we trust may be of some use, not only to the general reader, but to the profession, inasmuch as we have endeavoured to make it comprehend, in a condensed form, a portion of the whole of a very ample subject, it becomes a duty of justice in the Author of this Treatise to acknowledge his obligations to preceding writers.

The first of these in order is Mr. Reeves, who, in his admirable treatise on the Navigation Laws, was the first to reduce the numerous statutes and regulations relating to our trade and commerce into order and arrangement. Independently of the learning and research of this writer, it is not his least merit that, though his various acquirements and genius rendered him capable of adorning a subject even more sterile and unpromising than the Navigation Laws, he has had the good taste, and grave and correct judgment, to confine himself to that sober and didactic style adapted for the purposes of business and utility. His work is, perhaps, infinitely more valued than known. It is one of those productions which might have proceeded from the closet of a statesman; and must always be considered as a most valuable contribution to the Board of Trade, and to the English laws of Navigation and Commerce.

Conclusion of the Introduction.

To Mr. Reeves the Author is indebted for the general plan and division of the six first chapters on the Navigation laws; and, more especially, for the useful suggestion of a summary of Rules and Exceptions in the conclusion of each Chapter on the different branches of our trade; by which the practical lawyer and the merchant are conducted with so much facility through that labyrinth of statutes, to which almost every succeeding year has made some addition. These Rules and Exceptions the Author has endeavoured to make as comprehensive as possible, and to bring them down to the latest period. (*o*) In the Chapter on the Colonial Trade the Author has nevertheless been compelled to adopt somewhat of a different arrangement from that of Mr. Reeves, on account of the alterations made by the late treaties of peace.

He has, therefore, first brought down his review of this trade to a period before the late American war; and has then, in order to shew the state in which it *now* exists, divided his consideration of the subject into the four branches:—1. Of the trade between the Colonies and the United States: 2. Of the trade of the British West Indies with Foreign Colonies under the dominion of European princes—of the like

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(*o*) Mr. Reeves brings down the statutes to the 46 of Geo. III. They are brought down in the present Treatise to 59 Geo. III.

Conclusion of the Introduction.

trade with the Mother country, and between the colonies themselves respectively: 3. Of the trade of the ceded Colonies; and, 4. Of the trade with British America. At the end of this review he has subjoined the Rules and Exceptions, in the construction of which he cannot disguise the fear he feels lest he should occasionally be found inaccurate. He has then passed to a review of the general policy of the whole trade; and concluded with the Cases and Decisions which have arisen in the Courts of Law and Admiralty.

In the Chapter on the trade with Asia, Africa, and America, the Author was likewise compelled to deviate very considerably from the plan of Mr. Reeves. The opening of the trade with the East Indies to the general merchant rendered it necessary to take a review of the constitution of the Company as well as of the general sytem of this trade. The extinction of the monopoly of the South Sea Company, the Slave Trade, the American Navigation Laws, the Portuguese treaty,—all these were new circumstances by which the Author was obliged to enlarge his review of this important branch of our commerce.

In the European trade he has more closely adhered to the arrangement of Mr. Reeves's work. But even here it became necessary, in the Author's opinion, to take a larger view of the subject; and to include a consideration of the late war system under which our Navigation Laws were administered; to explain and methodise the system of licences; and to give a short synopsis of our present commercial relations with the different states of Europe.

Conclusion of the Introduction.

In the Fisheries it was almost impossible to follow any fixed plan, as the law relating to this branch of our subject had been almost wholly re-cast and newly modelled by recent statutes.

The Work, next in order of time, and in the use which the Author has made of it, is the Treatise on the law of Merchant Ships and Seamen, by Mr. Abbott, now Lord Chief Justice of the King's Bench. It is only to repeat the established opinion of the public and profession to say of this Work that, as far as it extends, it has perfectly exhausted the subject, and left nothing to following writers within the same compass of subject matter, but to illustrate and confirm his principles by new cases. The Author would deem it to be a want of due modesty to enter into a criticism upon a Work of such established fame; and he shall feel that he has accomplished all that he could ever intend or hope, if he shall be considered to have followed, not unworthily, in the same track.

LAW OF NAVIGATION,

Merchant Shipping,

AND

MARITIME CONTRACTS.

PART I.

THE LAW OF SHIPPING AND NAVIGATION.

CHAPTER I.

ORIGIN AND POLICY OF THE LAWS OF SHIPPING AND NAVIGATION; AND A REVIEW OF THE SEVERAL STATUTES RELATING THERETO, FROM THE 5TH OF RICH. II. TO THE ACT OF NAVIGATION OF 1651.

NO part of the English law has been less understood by the writers upon general policy, than our law of shipping and navigation. Almost all the authors upon political œconomy have regarded this portion of our law in the view of a commercial monopoly; and have demanded how our navy could be permanently maintained and augmented by a system which, in restricting the natural growth of our commerce, must diminish its demand, and therein its supply of ships and mariners. Upon the one part, indeed, it cannot be denied, that the effect of this system is to introduce a partial monopoly in favour of British shipping, and to deprive us of advantages which might follow from a less restricted liberty of commerce.

But, on the other side, the actual state of our navy and commerce appears to be a conclusive proof against the alleged mischief of such monopoly. With a navy equal to the extent of our empire, we possess a commerce which fills every channel for the possible employment of capital: it is a necessary conclusion, therefore, from this comparison, that our legislature has succeeded in accomplishing both objects of our insular policy; and has maintained and augmented our naval strength, without the sacrifice of our trade and commerce. A due examination of our law of shipping and navigation will justify this inference.

It will appear that the main object of the navigation laws was, primarily at least, not commercial, but political: that in a more remote period our commerce was, perhaps, too directly sacrificed to the growth of our navy; but that, in later times, when our navy had become more adequate to our national defence, and when commercial principles were better understood, the legislature has endeavoured to reconcile the two objects, and to support our naval establishment, with as little cost as possible to our commercial interests. Having two proposed objects, and these in some degree opposed to each other, the maintenance and augmentation of our navy, and the liberty of commerce, the legislature has deemed it wise to favour the former; and in this choice has preferred the interests of our national defence; not indeed to the interests of our whole commerce, but to that portion of them which would have resulted from a perfect liberty in the carrying trade. In almost all legislative measures they have kept the same principle within their view; and, where the two objects have come into competition, they have merely adhered to their first preference, and have required our merchants to concede something of the interests of trade, in order to advance and uphold the greater interest of the common defence.

Under this system, thus qualified by the prudence of the legislature, both objects have been happily accomplished. Our navy has been maintained and augmented in the degree required by our national policy; and the basis of our commerce has become so extended, our mercantile capital so enlarged, and our shipping and mariners so great and numerous, as effectually to counteract the evil of a restrictive system; and, in despite of the navigation laws, to render any monopoly in the carrying trade difficult, and almost impossible.

It is not within the subject of a legal work to discuss at any length the policy of the law which it professes to develope and explain. But it may be permitted to make these observations in answer to some arguments which have been revived against this system. The interests of mere commerce are certainly best advanced by a full and perfect liberty of trade: but national defence is a still greater interest than commerce itself. Something of the less object may, therefore, be wisely sacrificed in favour of the greater; and the legislature performs all that can be demanded of it, when, in pursuit of a greater good, it takes no more from the less than is required by the preference, and applies itself to correct (as they arise) the evils incidental upon its choice.

The law of shipping and navigation, as at present established, seems only to have commenced with the celebrated navigation act in the long parliament; and those who have written upon this subject of our law have generally proceeded from this period. But, upon an examination of our statutes, it will appear that some at least of the principles of this act had an earlier origin. Our insular situation, indeed, must have always suggested two main objects of our policy, a navy and commerce. Accordingly, from very early times, one or other of these interests has become the favourite objects of our kings and parliament. They have been pursued, perhaps, with less intelligence, and with less distinct views, than in more recent times; but it will appear that they have always been seen and acknowledged; and that the system of preference and exclusion is not, therefore, so entirely, as has been imagined, the creature of Cromwell and his parliament.

The acknowledged object of all our navigation laws has been the maintenance and increase of the navy; and, in one form or other, all the acts employ the same means, the preference of English ships or mariners, in English exports or imports. In the earlier acts this preference is expressed in the most full, simple, and absolute terms, with little consideration of any just commercial principles; and with a very loose, general, and inaccurate description of the subject matter of the statutes. As commerce proceeded, and as the effects of general prohibitions became manifest from experience, the navigation acts became more qualified in their prohibitions, and more precise in their description. A just distinction was taken between foreign merchants importing their own goods, and acting as carriers for others. The employment of their own shipping by foreigners was permitted, because it was required by commercial interests, and was the natural and proper use of their own means. But the carrying trade by foreigners was strictly prohibited, because a maritime people, like ourselves, were in a condition to become our own carriers; and because one of the national advantages of commerce is, that it should thus administer to the general defence.

Rich. II.

In reviewing the acts of navigation from the 5th of Richard II. s. 1. c. 3., in which the system of our navigation laws is commenced, down to the statute of 12 Charles II., and the more recent registry acts by which it is completed, it will be seen, that such has been the progress of the legislature in the gradual formation of this system; that it commenced with ordaining an absolute and unqualified preference of English shipping and mariners by all merchants trading and dealing with England; that it afterwards adopted the distinction of the carrying trade; that it described in more distinct and accurate terms what it intended by English ships and English crews; and, finally, that, for the sake of ascertaining such shipping at all times, and to give due effect to its encouraging or prohibiting regulations, it has finished and accomplished the whole by the registry acts.

The first act of navigation, as has been above said, is the 5th of Richard II. s. 1. c. 3. followed and qualified by the 6th of the same king, c. 8., and the 14th Richard II. c. 6. The statute of the 5th of Richard II. is expressed, to be made *for the increase of the navy*,—of the navy of England, which was then greatly diminished. It is therein enacted, that none of the king's liege people should ship any merchandise in going out, or coming within the realm of England, in any port, but only in ships of the king's leigance, under the penalty of forfeiting all the merchandise shipped in other vessels, or the value thereof. In the stat. 6 Rich. II. c. 8., the former enactment is qualified by the condition, *so long as ships of the said leigance were to be found able and sufficient in the parts wherein the merchants happened to dwell.* And in the 14th of Richard, c. 6. it is added, as a further qualification, "so long as the owners of the said ships take reasonable gains for the freight of the same." **6 Rich. II.**

From the reign of Richard II., till the reign of Edward IV., nothing was added to, or diminished from, these statutes. The stat. 3 Edward IV. c. 1. adopted and repeated their policy. It was enacted, by this latter statute, that no person inhabiting within the realm of England, other than merchant strangers, should freight, or charge within the realm, any ship of any alien, or stranger with merchandise, to be carried out of the realm, nor should bring any into it, if he could have sufficient freight in the ships of denizens, on pain of forfeiting the merchandise, half to the **3 Edw. IV.**

king, and half to the person seizing. This statute, indeed, was limited to three years, and concludes all that the legislature had done, with respect to navigation, in this first period of the system; that is, from the reign of Richard II. till the reign of Henry VII. Accordingly, all that was sought by the legislature in this first period, was to secure the preference of English shipping, by English merchants, in exporting and importing, but without any distinct view of the carrying trade; or, what was more important, without any precise and accurate description of what were to be considered English ships and English crews. Some effects of the carrying trade were, however, more obvious to the commons than to the government itself. In the 18th year of Henry VI. there exists on the rolls a petition of the commons to the crown, in which it is prayed, that thenceforward no Italian, or other merchants of the countries beyond the Straits of Morocco, should sell in this realm any other merchandise than that of the countries beyond the straits; for that since such Italian merchants had become carriers of the commodities of Spain, Portugal, and other countries within the Straits, those articles were not brought in such abundance, nor were they sold so cheaply, as when they were brought by the merchants of those countries respectively; or were fetched by the merchants of this country in their own ships, to the decrease of the king's customs, to the depreciation of the merchandize of the realm, and also a great hurt to all the navy of the realm (*a*).

Though this petition was not followed by any law, it appears from it, that the effects of the carrying trade were becoming more known, and that the commons of England had already conceived the policy of confining foreign ships to the carrying of the productions of their respective countries only (*b*).

(*a*) Reeves on shipping, &c. 12. and Reeves on shipping, &c. 13.

(*b*) Rolls Parl. 18 Hen. VI. c. 59.,

The second stage of our navigation system may be said to commence with the first year of Henry VII., in which we observe a most material advance towards our present policy, in the condition now first required, that the *mariners*, as well as the ships, should be of this country. By the 1st of Hen. VII. it was enacted, that no one should buy or sell within this realm, Ireland, Wales, Calais, or the Marches of the same, or Berwick, any manner of wine, of the growth of the duchy of Guienne, or Gascony, but such as should be adventured, and brought in an English, Irish, or Welshman's ship, *the mariners of which were English*, Irish, or Welshmen, for the most part, or men of Calais, or of the Marches of the same, on forfeiture of such wine, half to the king, and the other half to the finder. In the close of this statute is a clause saving the king's prerogative. The statute was to endure only to the next parliament, when it was revived by stat. 4 Hen. VII. c. 10. and extended to Thoulouse woad. The latter statute contained no reservation in favour of the prerogative, but substantially repeated the important clause in the statutes of Richard II., that no person inhabiting within this realm, other than merchant strangers, shall freight or charge within this realm, or Wales, any ship or other vessel of any alien or stranger, with merchandise, to be carried out of, or brought into, this realm or Wales, if he may have sufficient freight in ships of denizens, at the port where he makes his freight, on forfeiture of the merchandise, half to the king, and half to the person seizing the same. No other act was passed upon this subject during the reign of Henry VII. But these enactments were repeated, and confirmed by three several statutes in the following reign of Henry VIII. By the first of these statutes, 7 Hen. VIII. c. 2. the dispensing licences granted by the crown, notwithstanding the omission of the clause, saving the king's prerogative, in stat. 4 Hen. VII., were expressly declared to be void, excepting only such as should be executed before a certain short day then to come.

1 Hen. VII.

7 Hen. VIII.

23 Hen. VIII. The second of these statutes, 23 Hen. VIII. c. 7. is a mere recital of the stat. 5 Rich. II. stat. 6, and stat. 4 Hen. VII. and a declaration that they should stand in full force and effect. 32 Hen. VIII. The third statute, 32 Hen. VIII. c. 14. is intituled "an act for the maintenance of the navy of England, and for certain rates of freight." It confirms the preceding statutes, and appoints a certain price of freight between the port of London, and the principal ports in Europe, which, except in the time of war, was not to be exceeded. It likewise confines certain privileges, granted by royal proclamation, to merchant strangers importing and exporting merchandize, to such articles as were so imported or exported, in any "ship, bottom, or vessel of this realm, commonly called an English ship, bottom, or vessel." (*c*) And, to assist in the execution of the act, and to enable merchants to find and procure freight, the owners of English vessels were commanded to affix a notice in some public place in Lombard-street, for the space of seven days, of their purpose of sailing, and of their voyage.

Such were the two first stages of our navigation laws, in their progress to the system now established. In the former of these periods, we see that their object was the maintenance of the navy; and we see it pursued by an uniform course, the encouragement of English ship owners, and a preference to goods imported or exported in English vessels. In the latter period we see the same object, and the same means more strongly expressed, and an important advance to a necessary precision in defining what should be regarded as English ships. The crew and the bottom are here first distinguished.

The third stage commenced with a total change of views, and with a violent retrogression of the former system. The 6 Edw. VI. stat. 5 and 6 Edward VI. c. 18. commences with a com-

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(*c*) This is the first instance of an easement in duty made in favour of English ships.—Reeves on shipping, &c. 16.

plaint that the stat. 4 Hen. VII. had disappointed the views of the legislature.

The statute then repeals the act of the 4th of Hen. VII., and allows all merchants of countries in amity with England, to bring in wines of any part of France, or Thoulouse woad, in any ship whatever, the owner, master, and mariners, being of parts in amity with England. Here we see a total departure from the former system of preferring English ships and mariners: and this change was further followed by stat. 1 Eliz. c. 13. in which stat. 5 Rich. II. and stat. 4 Hen. VII. were formally repealed. So far there appears a violent conclusion of the former navigation policy of so many kings and parliaments. But the ministers of Elizabeth were no less clear-sighted as to the true interests of the country, than dexterous in apparently conceding to the jealousy of foreigners. The former acts were repealed to conciliate the feelings of those foreign states, which now began to retaliate our prohibitory laws. But the interest of English shipping was still preserved by a clause in the same act, which, professing only to secure the royal revenue, secured a preference to English vessels, as effectually, and less invidiously, than the former exclusive system. By this clause it was enacted, that all owners of merchandise, using other vessels than those of which the queen, or some of her subjects of this realm, were not possessors and proprietors, and the masters and mariners, for the most part, subjects of the queen, should pay subsidy and custom for the same as if strangers and aliens born. (*d*)

1 Eliz.

The above statute contains a further clause in favour of our naval growth; for, with the purpose of promoting the building of large vessels, it ordains that no hoy, or plate,

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(*d*) This act was only of a temporary duration, namely, for five years. It contains some subordinate regulations, of no consequence now to the general subject.

belonging to an English subject, should be employed in carrying merchandise from this kingdom to parts beyond the seas, on pain of forfeiture of such hoy or plate. But the most important maritime statute of this reign, and indeed the most important advance in our navigation system, previous to the act of Cromwell, was the stat. 5 Eliz. c. 5., intituled *an act touching politic constitutions for the maintenance of the navy;* an act which now first, and at once, introduced the two main principles of our navigation acts, as at present existing: the encouragement of the fisheries, and the exclusive possession of our own coasting trade.

5 Eliz.

The fisheries encouraged.

It was enacted in this statute, that all English merchants might export in English vessels herrings, and other fish taken upon the seas by English subjects, to any foreign parts, without paying any custom for the same; no toll, tax, or other restraint, was to be imposed in any port, or market, upon fish so taken; no purveyor should take the same without agreement with the owner or seller. None was to buy of a stranger, or out of a stranger's vessel, any herring not being sufficiently salted, packed, and casked, &c. The act was to endure for four years.

13 Eliz.

23 Eliz.

This act, the object of which was to render the fisheries subservient to the interest of shipping and navigation, was followed by two other acts of this reign; the stat. 13 Eliz. c. 11., and the 23 Eliz. c. 7. By the former of these statutes, no fish taken or brought into the realm by a stranger, could be dried within England, to be sold, on pain of forfeiture: by the latter statute, which was intituled *an act for the increase of mariners, and for maintenance of the navigation*, our merchants were prohibited from purchasing their salted fish in foreign parts, instead of employing our own fishermen. (*e*) The words of the act, describing the consequences of this practice, are very strong. It is owing to this, says the preamble, that two hundred sail and more,

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(*e*) Reeves on shipping, 24.

of good and serviceable ships, trading yearly to Ireland, have now decayed; as also a great number of mariners and seamen, fit for her majesty's service. The first, therefore, of these three acts, was a statute encouraging our fisheries, by exempting the fish taken by British vessels from all tolls or restraints: the two latter statutes added a further encouragement by a direct prohibition of the sale or purchase of foreign fish.

1 Jac. I. 3 Jac. I. In the following reign the two statutes, 1 Jac. I. c. 23. and stat. 3 Jac. I. c. 12., adopted and acted upon this policy; those acts being made for the encouragement of the herring and pilchard fishery, on the coasts of Somerset, Devon, and Cornwall. This encouragement of British fisheries, with a view to the maintenance of our navy and mariners, was thus commenced in the act of the 5th of Eliz., and was followed up to the 3d of James I. when it ceases to appear, until revived and more strongly adopted in the act of navigation. It is now one of the first and most established principles of our navigation system.

The 5th of Eliz. likewise introduced, as above said, the second main principle of our present system, the exclusive possession of our coasting trade, as a peculiar nursery for ships and seamen. But as the shipping of England was not yet equal to the demand of her trade, and particularly to her consumption of fish in a period of very imperfect agriculture, it was found necessary to repeal this statute by the 39th of Eliz. c. 10.; and the reason assigned is, that the natural subjects were not able to supply a tenth part of the realm with salted fish of their own taking. Another very fair and liberal principle is affirmed in this act; as the subjects of this country, says the act, may carry out salted fish, it would be unequal not to allow them also to bring it in, but rather to entrust this branch of trade wholly to foreigners. The truth is, that some very able men had already written upon the subject of trade and commerce; and it was understood now, nearly as well as in the pre- 29 Eliz.

sent day, that a profitable dealing comprehended buying as well as selling, and the taking of goods in payment, where the merchant could make more of them than by money.

The 5th of Eliz. enacted that no person should cause to be laden or carried in any bottom, whereof a stranger born was owner, shipmaster, or part owner, any kind of fish, victual, wares, or things of what kind or nature soever, from one port or creek of this realm, to another port or creek of the same, on pain of forfeiting the goods so laden or carried.

Such was the act of the 5th of Elizabeth, which, as continued and qualified by the subsequent acts above enumerated, constituted our practical navigation system, till the period of the act of navigation. It had already introduced two out of the three main principles of the system, as now established, viz. the encouragement of fisheries, and the exclusive possession of our own coasting trade. The third of these principles, the exclusive possession of the trade with our own colonies, followed immediately afterwards.

If we may here indulge in a momentary pause, and review what has been above stated, it will appear that our navigation laws, as they now exist, have been only gradually formed to their present shape and policy; and that, in early times, their object was neither very clearly seen, nor very consistently followed. Our writers upon law have indeed occasionally fallen into the same error with the writers upon our constitution. They have regarded, as belonging to one time, and to one set of men, that which has been the work of generations and centuries; and, could we revive those who are now considered as the fathers of our law and constitution, they would doubtless behold with more admiration than recognition, what we now call their original principles, and their wise foresight for themselves and their remote posterity.

If we content ourselves with the grave statement of truth, both as to our law and to our constitution, we shall allow more to the present time, and less to our ancestors. Every age, acting upon the general principles of prudence, and according to the compass of its own knowledge, has provided for its own immediate concerns; has applied a remedy to an actual or imminent evil, or adopted the most direct means for the attainment of an evident good. As far as respects our navigation laws, this is, perhaps, all we must allow to our ancestors. They have made laws and repealed them, according to the necessities of their own times. But, as their knowledge was not only much less than that of the present times, and as the political relations of the kingdom, and its commercial intercourse, were so much more limited and simple, it is as unjust to ourselves, as absurd in its own nature, to refer to them for the whole reason and policy of a system so artificial and extensive as our present navigation law. The subject matter of our present maritime policy, at least the three principal portions, the fishery, the coasting trade, and our colonial commerce, are almost entirely of modern origin, and all the important regulations regarding them are to be sought in modern statutes. To return, however, to our more immediate subjects.

The colonial, or, as it is more generally called by our earlier writers, the plantation trade, received the exclusive character which has since become attached to it, not so much from any regard of the mother country to the colonies, as from the peculiar circumstances of the origin of such colonies.

Colonies and plantations.

Such colonies were long considered as belonging more immediately to the crown than to the people: hence the crown deemed itself entitled to any peculiar profit which could be derived from them. All the early regulations of the colonies were made with this view, and are directed to this end. The colonists are commanded to send the whole of their produce to England, "that the staple of their commodities might be made here; and that his majesty, after so great an expense in the plantations, and having so many of his subjects transported thither, might not be defrauded of what was justly due for customs on the goods." In the document from which the above words are quoted (the instructions to Sir William Berkeley, governor of Virginia, (*f*) 1639) the governor is commanded to suffer no ship to depart from Virginia laden with the produce of that colony, before bond and sufficient sureties should be given to bring the same into his majesty's dominions: he was likewise to take bonds of the owners of tobacco, that it should be brought to the port of London, and there pay its customs.

Colonies, &c. The exclusive possession of the colonial trade by the mother country originated, therefore, in these views of revenue, and only in a secondary degree from the supposed family analogy of the parent state and its remote settlement. Hence, not in England only, but in all the old kingdoms of Europe possessing plantations, the colonial system has the same character; these kingdoms encourage the produce of their colonies in preference to the like produce from other states; and, in return, require that these colonies should send their produce exclusively to the mother country.

In the reign of James I., and during the first years of Charles I., our colonial trade was placed under strict and somewhat selfish regulations. The governors were instructed to watch over the interests of the king's revenue, and, to that end, to take the bonds above described; but, so long as this object of the revenue was secured, the king and council appear to have little concern for any other interests. In the year 1646, when the parliament had assumed the sovereign power, the public interest was more

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(*f*) Reeves, 30., and Chalmers' Political Annals, 132.

distinctly seen; and, in an ordinance of the 23d of January in that year, the parliament provided not only for the exclusive transportation of the colonial produce into England, but for the exclusive employment of British bottoms in such transportation.

This ordinance is intituled, "privileges granted to several foreign plantations;" it indicates its object in its commencement, by reciting, that the plantations had been "greatly beneficial to the kingdom, by the increase of navigation," and by the customs upon the produce of such plantations imported into this country.—The ordinance then proceeded to grant some facilities and encouragement for the further settlement and supply of the plantations, such as the free exportation from England, for the next three years, of all merchandise and necessaries for carrying on such plantations, due security only being given to the commissioners of the customs, for the actual exportation of such merchandise to such plantation, and for the return of a certificate from thence within one year, of the arrival and discharge of the ship. The ordinance next proceeded to allow the departure of British subjects who were willing to become servants or settlers, requiring only the registration of their names at the custom-house. It then concluded with this important provision, that none of the plantations should suffer any vessel to take in any articles of the growth of the said plantations, and carry them to any foreign parts, except in English bottoms: "and in case any of the said plantations shall offend herein, then the plantation so offending shall be excluded from the benefit of the ordinance (*g*)."

Colonial trade.

Some of the colonies having afterwards expressed an attachment to the house of Stuart, the parliament, in great indignation, issued an ordinance against them, October 3, 1650, in which, after declaring the offending colonies to be

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(*g*) Reeves, 32.

traitors and rebels, they conclude by imposing a restriction upon all the plantations in general; a restriction found to be so useful, if not necessary, that it has thenceforth passed into our colonial and navigation system. That no enemy of the commonwealth might procure a passage to the colonies, and that no dangerous person might find admission, the parliament prohibited all foreign vessels from entering any colonial port. All such ships were forbidden in the most comprehensive words to come to, or trade in, or traffic with, any of the English plantations in America, or any islands, ports, or places which are planted by, and in possession of, the people of this commonwealth, without licence first had and obtained from the parliament or council of the state.

Such was the progress of that branch of our navigation and commerce, which, from its importance both in value and policy, has since become distinguished by the name of our colonial trade and system. Its exclusive character, both as to the exportation of colonial produce, and to the importation of colonial supply, originated rather in views of revenue than in any object of general policy, or any interests of trade and navigation. In the first settlement and discovery of our plantations they were granted, governed, and administered, as so many crown lands; nothing was considered but revenue. A very short experience proved their value to the navigation and commerce of the country. At this period, unfortunately in some circumstances, but not without some good in others, the administration of the kingdom was in the hands of a parliament comprehending many able men; whose ability was seconded and rendered effectual by a contempt of the jealousy and enmity of foreign powers. They saw the peculiar interests of the kingdom as an insular nation, and they resolved to pursue them: they began by completing and securing our exclusive possession of our own colonial trade. They strictly confined the colonists to transportation in English bottoms only; and, that they might secure the execution of this law by rendering the transgression of it nearly impossible, they finished this portion of their new system, for such it may be called, by prohibiting all foreign vessels from approaching their colonial ports.

The course of our deduction now leads us to the celebrated act of navigation passed by the parliament in the following year, October 1651; an act which, aiming at the increase of English shipping, and collecting all the previous laws which had been made from the earliest times with the same purpose, at once established that system of maritime policy, which has since undergone no further change than what has been necessary to render it more effectual. The first object of this act was to deprive the Dutch of that carrying trade by which they had become the most wealthy nation in Europe. At the period of this act, they were the carriers even for the British colonies, and, in such a proportion, that of forty vessels from the West Indies thirty-eight are said to have been Dutch. The first object of the parliament was to terminate this monopoly: the second purpose was to enlarge the sphere of employment for English shipping and seamen, by prohibiting all foreign nations from becoming the carriers for each other; confining each nation to the bringing of its own produce only, and thus (as half the nations in Europe had no sufficient vessels of their own) compelling English merchants to fetch in English vessels what their foreign dealers could not transport.

In pursuance of these objects, the ordinance commences with a regulation, which, in terms as simple, and apparently as equitable as comprehensive and effectual, at once strikes at the root of the evil, and establishes a distinction so plain, so practical, and so sufficient, that in nearly two centuries nothing more has been necessary than to maintain and support it. It first enacts, that no goods or commodities whatever, of the growth, production, or manufacture of Asia, Africa, or America, or any part thereof, or of any islands belonging to them, as well English plantations as others, shall be imported into England, Ireland, or any part of the commonwealth, in any other ship or vessel whatsoever, but only in such as do truly, and without fraud, belong only to the people of this commonwealth, or the plantations thereof, as the proprietors or right owners thereof, and whereof the mariners and masters are also, for the most part of them, of the people of this commonwealth, under the penalty of the forfeiture of the goods and ship.

By the effect of this clause, therefore, the whole import of the productions of three parts of the world was secured to English ships. The next clause is only less extensive with respect to the trade of Europe: it enacts, that no goods, the growth, production, or manufacture, of Europe, shall be imported into the commonwealth of England, Ireland, &c. in any ship or vessel whatsoever, but in such as do truly, and without fraud, belong only to the people of this commonwealth, as the true owners and proprietors, and in no other, *except only such foreign ships and vessels as do truly and properly belong to the people of that country, or place, of which the said goods are the growth, production, or manufacture, or to such ports where such goods can only be, and most usually are, first shipped for transportation*, under the penalty of the forfeiture of the goods, and also of the ship in which such goods shall be so brought in and imported. And no goods or commodities which are of foreign growth, production, or manufacture, and which are to be brought into this commonwealth in shipping belonging to the people thereof, shall be by them shipped or brought from any other place or country, but only those of their own growth, production or manufacture. As the first clause, therefore, took the colonial trade from the Dutch, so this second clause deprived them of being the carriers of Europe, and obliged our merchants to become themselves the carriers for those nations who had no shipping belonging to them. They were compelled, moreover, to fetch all such foreign commodities from the place of their growth or manufacture, instead of, as hitherto, buying them in Holland, which, under this monopoly of the carrying trade, was becoming another Tyre and Sidon.

The act next proceeded to the permanent establishment of our fisheries, by enacting that no cod, ling, herring, pilchard, or any kind of salted fish, should be imported into the commonwealth, or in any of our plantations, but only such as should be caught in vessels that truly belonged to the people of this nation. The fourth and last object of the ordinance was, the coasting trade, which was rendered equally exclusive to us by a clause enacting that no person should load, or cause to be loaded, in any bottom, ship, or vessel whereof any stranger born (not being a denizen, or naturalized), was owner, part owner, or master, any fish, victual, wares, or things, from any port or creek of this commonwealth to another, under the penalty of forfeiture of the goods.

To these principal clauses were added four provisoes, by which some certain exemptions were made; but all, as will be seen, in favour of *English shipping* only.

The first of these clauses was in favour of Levant and East India goods brought in English shipping. By this it was enacted, that the act should not restrain the importation of the commodities of the Straits, or Levant seas, laden in the shipping of this nation, at the usual ports or places within the Straits or Levant seas.

The second was in favour of English ships bringing South American goods or produce from Spain and Portugal, or goods and commodities which came from, or belonged to, any of the plantations or dominions of either of those nations.

The third exempted the silk, and silk wares brought by land from Italy on account of English merchants; these might be shipped in *English vessels* from Ostend, Rotterdam, &c., the owner in England making oath before the comptrollers of the customs, that the goods were so bought for his account in Italy.

The fourth exempted bullion, and goods taken by way of reprisals, from the operation of the act.

Such was this act, or ordinance, which is not only the ground work of our present system, but is, in all its divisions and subdivisions, the complete frame of the whole law of navigation as now established.

For the sake of a due order in our future enquiries, and that the Reader may follow us with more ease, we shall conclude this introductory chapter by observing, that the whole substance and system of our navigation law, even as now established, may be summarily represented and comprehended in the following short analysis.

The object of our navigation laws is the maintenance and increase of our shipping and navy, and the employment of our own mariners. The means by which this object is sought to be established are five:—

First, Exclusion of foreigners from the carrying trade for each other, and the consequent compulsion upon the British merchants to use *British shipping*, in fetching the goods of those nations which have not themselves the means of bringing them.

Secondly, The exclusive supply of the consumption of this country and our islands in salted fish; or, in other words, the encouragement of our fisheries; and particularly those of Greenland and Newfoundland.

Thirdly, The exclusive possession of our colonial trade.

Fourthly, The exclusive possession of our coasting trade.

Fifthly, A system of registration, which, by ascertaining the actual ownership of vessels, keeps them always under the eye of the law, and renders it impossible for foreigners to have such an interest in them as might be prejudicial to the state; and for merchants or captains to evade the several acts for the preference and encouragement of British ships.

CHAPTER II.

THE PLANTATION, OR COLONIAL TRADE.

Navigation act, 12 Car. II.

THE parliamentary ordinance of 1651 was the systematic commencement of the navigation laws, as now regarded and established: but as this ordinance necessarily passed away upon the restoration of the royal government, it was revived, legalized, and in some degree enlarged, by the stat. 12 Car. II. c. 18., which has thus become the great of our shipping and navigation:—it is intituled an act for the increase of shipping, and *encouragement of the navigation of this nation, wherein, under the good providence and protection of God, the wealth, safety, and strength of this kingdom is so much concerned.*

In the conclusion of the last chapter it was observed, that the design of our shipping system might be very simply and summarily represented; that its object was to promote the increase of British shipping by securing the demand and employment of it, and that its means, to this end, might be distributed under the respective heads; the colonial trade; the trade beyond Europe not being colonial; the European trade; the coasting trade; the fisheries; and the regulations for ascertaining the ownership and built of English ships.

If the act of Car. II. be examined, it will be found that all its objects may be arranged with equal precision and fulness under the same divisions: our enquiry, therefore, will be directed in this order. We shall commence with examining under each head what the act of Charles has enacted and required; and then subjoin what has been added, diminished, or changed, by the laws since passed. The colonial trade is first in order.

Colonial trade.

The first object of the act is to secure the exclusive and total possession of the trade to our colonies, both as to our supplying them with European goods, and becoming the staple and market of their produce, to be carried in British ships only. To secure this exclusive possession, the first and second section enact, that no goods shall be imported into, or exported out of, any of the lands, islands, &c. belonging to his majesty in Asia, Africa, or America, in any other ships but in such as do truly belong to the people of England, Ireland, Wales, &c., or are of the built of, and belonging to, any of the said lands, islands, &c. and whereof the master, and three-fourths of the mariners at least, are English, under the pain of forfeiture of such vessel, &c.—Aliens, and persons not born within the king's allegiance, or naturalized and made free denizens, are prohibited from becoming merchants or factors in such colonies; and every governor, before he enters upon his government, is required to take an oath that he will neglect no effort to procure the observance of the regulations enacted.

The above sections confine the carriage of colonial produce to British ships. A second object was to secure to the mother country the staple and market of their produce. With this design the principal articles of colonial growth, such as tobacco, cotton, wool, indigo, ginger, fustick, and all other dyeing wood, are expressly enumerated in the act; and it is commanded that they shall be carried only to the mother country. These articles, from the express mention, have thenceforth been called by the name of *enumerated goods;* and that the English shipping might be benefited by the profit of bringing them home, and English merchants might exclusively enjoy the profit of sending them to other parts of Europe, the 18th section of the act inflicts the forfeiture of goods and ship upon any vessel which should carry such articles from such colonies to any other place than the British dominions, except to some other English plantation. And to take a further security for the due execution of this part of the act, the following section (the 19th) requires, that every ship sailing from any British port, for any English plantations in America, Asia, or Africa, should give sufficient bond, and one surety to the officer of the port whence she sails; that such vessel shall bring such enumerated goods to some port of England, Ireland, Wales, or Berwick-upon-Tweed only. The governor of any island is to take the same bond from any vessel coming at first from one plantation to another, or from any other place; and copies of such bonds are to be sent to the chief officers of the customs in London twice in the year.

By this regulation of our colonial trade, the navigation act of Car. II. sought two immediate objects:—the first was the exclusive supply of our colonies, in British shipping, with all European goods; and, secondly, the exclusive transmission, in British vessels to a British port, of all articles which were the growth of such colonies. The 15th of Car. II. c. 7. repeated and enlarged these enactments of the 12th of the same king: it is intituled an act for the encouragement of trade; and the 5th sect. enacts, that, in regard that his Majesty's plantations beyond the seas are inhabited and peopled by his subjects, of his kingdom of England, for the maintaining a greater correspondence and kindness between them, keeping them in a firmer dependence, and rendering them yet more beneficial and advantageous in the further employment and increase of English shipping and seamen, in the vent of English woollen, and other manufactures and commodities, rendering the navigation to and from the same more safe and cheap, and making this kingdom a staple, not only of the commodities of those plantations, but also of the commodities of other countries and places, for the supplying of them: and it being the usage of other nations to keep their plantation trade to themselves,—*Be it enacted*, (s. 6.) &c., That no commodity of the growth, production, or manufacture of Europe shall be imported into any land, island, plantation, colony, territory, or place to his Majesty belonging, &c. in Asia, Africa, or America, (Tangier only excepted) but what shall be bonâ fide, and without fraud, laden and shipped in England, Wales, &c., in English built shipping; and whereof the master, and three-fourths of the mariners at least, are English, and which shall be carried directly thence to the said lands, islands, plantations, &c., and from no other place or places whatsoever. The 7th sect. contains an exception in favour of the shipping of salt for the fisheries of New England and Newfoundland, and of the wines of Madeira and the western islands, which the act permits to be transported into any of the lands, islands, plantations, &c.—Then follow some clauses for the prevention of fraud, and for the imposing penalties upon officers of customs for neglecting their duties (s. 8, 9.)

It will be seen that this act took away the direct trade of Ireland and the colonies; and the reason assigned was, that England chiefly suffered from the emigration of her inhabitants to the plantations. But as this direct trade with Ireland was forbidden only by the omission of her name, instead of by an express mention, it appears that the merchants, deeming this omission an inadvertence of the legislature, paid no regard to it. The stat. 22 and 23 Car. II. c. 26. was passed to terminate all such doubts by an express declaration. This act directs, (s. 11.) that the word Ireland shall not be admitted into the bonds taken for any ships sailing from England, Ireland, Wales, &c. for any English plantation in America, Asia, and Africa, that all such ships should unload in some port of England or Wales only, and in the same manner as all other ships permitted by the act of navigation to trade with the plantations. The governors of the colonies are commanded to take bonds of the same kind from all ships sailing from their respective colonies laden with colonial produce, and once at least, in every year, to make a return to the officers of customs in London. The usual penalty of forfeiture of ship is added to all those detected in such contraband trade. But that the colonies might receive some return for these restrictions upon their trade, it is further provided, in the same acts of the 22 and 23 of Car. II. (in confirmation of a previous statute prohibiting the planting of tobacco in England, Wales, Guernsey, Jersey, &c.) that constables should search and make presentment at the sessions of all persons who had planted tobacco; and upon a warrant from a justice should pluck up and destroy it wheresoever found. (*a*) This act is continued by the 5 Geo. I. c. 11., during such time as the act of tonnage and poundage of the 12 Car. II. c. 4. is continued, and no longer. Having thus restricted the colonial trade, both as to export and import, to the exclusive benefit of the mother country, the government neglected no means to enforce the execution of its acts; and, in addition to the forfeitures and penalties abovementioned, employed all its naval and civil means to prevent and punish contraband dealings and voyages. The Lord Admiral was specially ordered to superintend the execution of the act of navigation. The privy council issued similar orders from time to time to the officers of customs to keep a vigilant attention upon all ships loading and sailing from the colonies, and to see the execution of that part of the act of navigation which prohibited such ships from going to foreign ports without first coming to England. And as the colonists themselves were particularly active in efforts to evade this law, orders were given to the governors to examine the built of all ships coming into their colonies, to require their certificates, and to take the necessary bonds. (*b*)

The colonists made several attempts to procure relief from a monopoly which impeded their progress in cultivation

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(*a*) S. 1, 2. the act of the 22 and 23 of Car. II. is intituled an act *to prevent the planting tobacco in England*, &c.

(*b*) Reeves, 56; and Chalmers' Political Annals, 260.

and improvement. In 1671, Sir William Berkley, the governor of Virginia, complains in strong and even eloquent terms, of that act of navigation, which, by excluding the colonists from all trade but with England, prevented them from adding to their plantation any commodity that grew out of it, such as olive trees, cotton, or wines. He complains that a very promising silk trade was totally ruined by this mischievous restriction; and that ship building, in despite of all the advantages at hand, could not be undertaken. He concludes by expressing a despair of all improvement in their trade; unless such acts be qualified or repealed, and liberty be given to the colonists to transport their staves, timber, and corn, to other places besides the king's dominions. (*a*)

In 1676 the island of Barbadoes made similar complaints: but the governments, and the lords of the committee for the plantations, upon considering the subject of such petitions, contented themselves with replying, that the navigation laws were the settled laws of the land, and that they ought to be supported. In the case of New England, indeed, an exemption was very early conceded to the peculiar character of its produce. The New Englanders complained, that they were required to give bond to land all their commodities in England or Wales. But the chief produce of their plantations was timber, staves, fish, and other such gross articles, which were scarcely worth the conveyance to England, but which they could sell very profitably to Spain and other parts. Upon this ground they solicited a relaxation from the terms of the bonds. The privy council, deeming that this request was reasonable, acceded to their petition; and commanded that for all commodities laden in New England, the bond should be taken for returning the proceeds only, and not the goods in specie. The consequence of this relaxation afforded an eminent example of the unforeseen mischief of loose and general terms in dispensing with laws of regulation. The

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(*a*) Reeves 59. Chalmers' Pol. Ann. 324, 327.

lords of the committee ordered that all goods *laden in New England* should be exempted from the bonds required by the navigation act, but which relaxation they evidently intended in favour of the timber, staves, and fish, the produce of that colony only. But under the term *all goods* the other plantations conveyed their sugar, tobacco, &c. to New England; and the New Englanders, under the cover of the exemption in their favour, sent them to every part of Europe.

The main produce of New England was, indeed, in those articles which compose what has always been termed the lumber trade: and as there was no reason for compelling the plantations to send these gross goods to England, and, indeed, as many of them would not pay their freight, such goods were regarded as not included in the act of navigation. With the single exception of Virginia, the lumber trade remained open to all the plantations, until it was afterwards limited in the reign of George I. The principal produce of Virginia was tobacco; and this colony was exempted from the indulgence granted to the others with respect to the lumber trade, lest a facility should be thus afforded for the contraband exportation of her tobacco.

As the colonists had so many temptations to evade the restrictions imposed upon their trade by the mother country, and as they availed themselves of every opening afforded by any looseness, or want of comprehension, in the literal terms of the several statutes, the legislature, in confirmation of its general policy, found itself compelled to interpose from time to time by declaring and explaining its acts.

7 & 8 Wm. III. The next statute of colonial regulation, that of the 7 and 8 Will. III. c. 22, was passed with this purpose. The former acts confined the colonial trade to ships having English or Irish owners, *or built and owned* in the plantations. They did not, therefore, require the ships to be *built* in England or Ireland. This act of William requires the

ships to be of the built of England or Ireland. It enacts that no goods or merchandise shall be imported into, or exported out of, any English colony in Asia, Africa, or America, or laden in and carried from one colony to another, or into England, Wales, or town of Berwick, in any ship or bottom but what is the built of England, Ireland, or of the said colonies, and wholly owned by the people thereof, or any of them, and navigated with the master and three-fourths of the mariners of the said places only, under pain of forfeiting the ship, &c. Two exceptions are then made, the one in favour of prize ships, but which must be navigated by the master and three-fourths of the mariners English, and be English property. The other was a temporary exception for three years, in favour of foreign built ships, employed by the commissioners of the navy in bringing masts, timbers, and naval stores.

The same act then proceeded to supply another oversight of previous parliaments, of which advantage had been taken. The navigation act required the governors to take an oath to observe all the clauses therein *before*-mentioned; a form of expression under which the governors assumed a power to dispense with the observance of *all* that followed. To meet this equivocation, the 7 and 8 of William requires such governors to take an oath to employ their utmost efforts, that all the clauses, matters, and things, contained in the before-mentioned acts, and those in force relating to the colonies, and all the clauses in the present act, should be punctually observed. Several other regulations were added, to prevent a fraudulent connivance or gross neglect upon the part of the officers of customs employed to superintend the export and import of the colonies. The colonial superintendant appointed under the authority of stat. 15 Car. II. c. 7. and known in the colonies under the name of the *naval officer*, was required to give full and ample security to the commissioners of the customs for the faithful performance of his duty. All the rules for entering, lading, and discharging, required by stat. 13 and 14 Car. II. c. 11., for England, are extended to the colonies; officers are to have the same power of visiting and searching ships; and all wharfingers, owners of quays and wharfs, &c. assisting in conveying, concealing, or rescuing goods, are made subject to the same penalties.

The stat. 25 Car. II. c. 7. permitted the colonists to carry goods from one colony to another only upon the payment of certain duties. The colonists, under the cover of some loose terms in that act, had extended its construction to a permission to carry such goods to any foreign market in Europe; and the duties being less than the profits, they had eagerly availed themselves of this traffic.

To terminate this practice it was now declared, by the act of William, (sec. 8.,) that such commodities should not be laid on board till the due securities required by the Navigation Acts were given to take them to England, or to some English colony only.

Another means of contraband trade had been the use of false and counterfeit certificates, importing that security had been given at home to bring home cargoes of plantation goods, of having discharged such goods in England, or of having taken in the lading of European goods in England. To prevent these mal-practices the governor is authorised, upon reasonable suspicion, to demand further security; and a penalty of 500*l.* is imposed upon any person counterfeiting any such request, certificate, or return, (sec. 10.)

The act further authorizes the commissioners of the treasury to appoint, as often as shall be needful, officers of the customs in the colonies. Juries, upon trials for unlawful importation, shall be natives of England, Ireland, or the colonies only. All offices of trust to be confined in the same manner to native subjects of the crown of England, (sec. 11, 12.) Proprietors of colonial lands are prohibited to alien, except to natural-born subjects, unless permitted otherwise by licence of the king. And all governors are to be approved by the king, and to take the oath required by this or any other act to be taken by other governors or commanders-in-chief in the plantations, (sec. 16.)

The Navigation Act had been often evaded, under the pretext that stress of weather compelled the ship to put into some port of Scotland, or Ireland: the statute met this evasion by enacting, that such commodities should not be landed in Ireland or Scotland, upon any pretence whatever; but if the ship should be stranded, or should be driven into any port of Ireland, by leakiness or other disability, and be unable to proceed upon her voyage, the goods might then be put on shore, but should be delivered into the custody of the collector of the customs, and should there remain till they could be put on board some other vessel, at the charge of the owner, and therein conveyed to some port in England or Wales, or the town of Berwick: the officer to take good and sufficient security for the delivery of the same, (sec. 14, 15.)

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Such is the colonial system of shipping and navigation, as constituted by this and the preceding acts, and with a very few alterations, now about to be mentioned, such it continues to be to the present day. The government, looking chiefly to the revenue, and the parliament to the maintenance of a navigation system well understood by the statesmen of that period, concurred in maintaining the exclusive possession of the import and export trade to and from our colonies and plantations.

Two important additions to the system very soon followed the act of 7th and 8th Wm. III. c. 22. The first was the institution of Courts of Admiralty, and the appointment of persons to the office of attorney-general in the colonies; the second, was the fourth article of the Act of Union of England and Scotland, by which all the sub-

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jects of Great Britain were admitted into a participation of the colonial trade. (*c*)

The following alterations have been made from time to time; and, together with the acts above-enumerated, compose the colonial system, as existing in the present day.

In the Navigation Act, rice and molasses are not included as enumerated goods. By stat. 3 and 4 Ann. c. 5. they are put under the same condition. They are to be brought into the kingdom under a like bond, and in the same manner; and stat. 8 Geo. I. c. 18. enacts the same with respect to copper ore.

By stat. 3 and 4 Ann. c. 8. linens, the manufacture of Ireland, may be laden from any Irish port by any native of England or Ireland, and thence transported, (in English shipping,) directly to the plantations.

By stat. 3 Geo. II. c. 28., any subject of his Majesty, in a ship of English built, clearing outwards from Great Britain for Carolina, may load rice in that province, and carry it to any port of Europe southward of Cape Finisterre. The master was to take a licence from the officers of customs at home, and to give bond that he would not carry other plantation articles.

The several statutes, 13 Geo. I. c. 5., 3 Geo. II. c. 12., 2 Geo. III. c. 24., were passed to give liberty to export salt directly to the provinces of Pennsylvania, New York, and Nova Scotia: in *all* these cases the ships were to be of British built, and navigated according to law.

The stat. 4 Geo. II. c. 15., was an act of more consequence, as it opened to Ireland part of the import trade from the colonies. It enacts, that goods of the plantations

(c) 5 Anne, c. 8.

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not enumerated, may be landed in Ireland, notwithstanding the stat. 7 and 8 Wm. III. c. 22. (*d*)

By stat. 8 Geo. II. c. 19., the province of Georgia was allowed to have her rice carried directly to Europe. By stat. 4 Geo. III. c. 27., permission was given to carry rice from South Carolina and Georgia, to any part of America southward of these colonies. By stat. 5 Geo. III. c. 45., the same benefit was extended to North Carolina.

By stat. 12 Geo. II. c. 30., and stat. 15 Geo. II. c. 33., all ships belonging to Great Britain, and navigated according to law, were permitted to load sugar in the colonies, and carry it thence to any foreign part of Europe, having taken a licence from the commissioners of customs in London or Edinburgh. These acts were repealed by stat. 34 Geo. III. c. 42.

By stat. 15 Geo. II. c. 31., it was enacted, that plantation-bonds taken in England, with respect to goods to be landed in England, should contain a condition to produce a certificate within eighteen months of the date thereof.

The statutes of 4 Geo. III., and 5 Geo. III., add the following regulations:—

In order to prevent the sale in America of foreign molasses and syrups, a bond was to be required from all ships trading there; that, if they took in such foreign articles, they should bring them, without diminution, to some of his Majesty's colonies or plantations in America, or to some port in Great Britain. (*e*)

The articles of coffee, pimento, cocoa-nuts, whale fins, raw silk, hides and skins, pot and pearl-ashes, of the growth, &c. of any British colony in America, are added

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(*d*) Reeves 72.

(*e*) 4 Geo. III. c. 15. s. 23 and 24.

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to the goods called enumerated goods, and are ordered to be imported directly from America into this kingdom, or other British colony, under the securities and penalties of stat. 12 Car. II. c. 18., and stat. 25 Car. II. c. 7. s. 27.

Iron and lumber, the growth of a British colony in America, are prohibited from being laden in America, till bond given that such iron and lumber should not be landed in any other part of Europe except Great Britain.

It was a frequent fraud at this period for vessels to take in a small portion of goods, as if for the American colonies, and, procuring a clearance for such parcel, to land under cover of it a cargo, the greater portion of which was foreign goods. To prevent this practice, it was another regulation of this act, that no cocket, or clearance for the colonies, should be given, unless the whole and entire cargo were laden and shipped in this kingdom. Salt, laden in Europe for the colonial fisheries, Madeira wines, wines of the Azores, and horses, victuals, and linen cloth, of and from Ireland, were excepted from this restriction.

A more important regulation concluded this act: in order more effectually to prevent any contraband trade, all vessels were subjected to seizures which were found hovering within two leagues of the shore of any British colony in America.

The 5 Geo. III. c. 45. altered the provision with respect to iron and lumber; allowing the iron to be carried to Ireland, and the lumber to the Madeiras, the Azores, or to any port of Europe southward of Cape Finisterre; due bond being given that they should be landed only there, or in Great Britain.

The Isle of Man being employed as the emporium of a smuggling-trade, the 5 Geo. III. c. 39. enacted, that no

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rum, or other spirits, should be shipped from any British colony in America, but on condition that they should not be landed in the Isle of Man. (sec. 5.)

By stat. 6 Geo. III. c. 52. (s. 30 and 31.), before any ship shall take on board *non*-enumerated goods, bond shall be given that such goods shall not be landed in any part of Europe to the northward of Cape Finisterre, except in Great Britain. But, as it was found that the letter of this act excluded Ireland from the import-trade already granted to her, the 7 Geo. III. c. 2. was passed to amend this construction.

A very extensive smuggling had long existed between the West Indies and the Spanish Main. The English government deemed it prudent to seek to regulate what it could not totally prevent. The best principle of such regulation appeared to be, that of bringing such trade under the more distinct view of the government, by appointing particular ports whence such articles might be exported or imported. With this purpose the FREE-PORT ACT, 6 Geo. III. c. 49. was passed. By this act, live cattle, and all goods whatsoever, (except tobacco,) the growth and produce of any non-British American colony, might be imported into the ports of Prince Rupert's Bay, and Roseau, in the island of Dominica; and, (except sugars, coffee, pimento, ginger, molasses, and tobacco,) into the ports of Kingston, Savannah la Mar, Montego Bay, and St. Lucia, in Jamaica, from any foreign American colony, in any foreign vessel, not having more than one deck. This act was enlarged in some of its provisions, and altered in others, by 14 Geo. III. c. 41., and 21 Geo. III. c. 29.; but these acts were repealed by 27 Geo. III., which contains nearly the whole of the present law and regulations of free-ports.

The fishery from Guernsey and Jersey, to Newfoundland, rendered necessary a certain direct commerce be-

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tween those islands and the American colonies. But this trade was contrary to the stat. 15 Car. II.; hence the stat. 9 Geo. III. c. 28. was passed, by which it was allowed to export from those islands "any sort of craft, cloathing, or other goods, the growth and manufacture of Great Britain, Ireland, or those islands, to Newfoundland, or any other British colony, where the fishery is carried on; the same being necessary for the fishery, or the mariners, or persons employed therein." And it was further enacted, that any non-enumerated goods, (except rum,) might be landed in Guernsey and Jersey.

Export trade from Ireland.

But the last and most important change made in the colonial trade, during this period, was effected by stat. 18 Geo. III. c. 55., by which this trade was laid open to Ireland. It was enacted by this statute, that it should be lawful to export from the kingdom of Ireland, directly into the British plantations in America, the West Indies, or on the coast of Africa, in ships or vessels that may lawfully trade to or from those places, any goods, wares, and merchandize, being the produce or manufacture of Ireland, (wool, woollen, and cotton manufactures of all sorts, mixed or unmixed, hats, glass, hops, gunpowder, and coals, only excepted,) and also all goods and commodities of the growth, produce, or manufacture of Great Britain, which have been, and may be, legally imported thence into the kingdom of Ireland, woollen manufacture, in all its branches, and glass excepted. (*f*) Foreign linens, bar-iron, slit-iron, manufactured iron-wares, (till a duty therein named should be granted by the Irish parliament,) and cotton manufactures, (unless certificated to have been previously exported from some port in Great Britain,) are excepted from this permission to export. And, that the Irish merchants and manufacturers might not undersell those of England, the permission was further restricted to those goods and merchandize of the manufacture of Ireland, which shall stand

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(*f*) 18 Geo. III. c. 55. s. 1—6, &c.

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chargeable, and pay duties and taxes, to as great an amount as goods and merchandise of the same denomination and quality exported from Great Britain, *now* (*g*) stand chargeable with; whether such charges be upon the importation of the materials of which the goods and merchandise are made, or by duties on their exportation, or by inland excise, not drawn back or compensated by bounties. At the urgent solicitation of the people of Ireland this act was still further enlarged, and rendered nearly co-equal with the liberty of trade to English merchants, by stat. 20 Geo. III. c. 10. By this act, with respect to imports, it was enacted, that any goods, wares, or merchandise of the growth, produce, or manufacture of the British colonies or plantations, in America or the West Indies, or of any settlement belonging to Great Britain on the coast of Africa; and which, by any act of parliament, are required to be imported from thence into Great Britain: and also all other goods which, having been in any way legally imported into such colonies, plantations or settlements, may be legally exported from thence to Great Britrin, may be laden in, and exported from, such colonies, plantations, or settlements, and imported from thence into Ireland: and, with respect to the *export* trade, that any goods or commodities of the growth, produce, or manufacture of the East Indies, or other places beyond the Cape of Good Hope, which are now required by any act of parliament to be shipped or laden in Great Britain, to be carried directly from thence to any British colony or plantation in Africa or America; as also any other goods, wares, or merchandise, (which now, or hereafter, may be legally shipped, or laden in Great Britain, to be carried directly from thence, and imported into any colony or plantation in America or the West Indies, or any British settlement on the coast of Africa,) may be *exported* directly from Ireland, and imported into such colonies, plantations, or settlements, any of the following statutes notwith-

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(*g*) That is, at the time of passing the act, s. 7.

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standing; viz. stat. 12 Car. II. c. 18., stat. 22 and 23 Car. II. c. 26., stat. 15 Car. II. c. 7., stat. 4 Geo. III. c. 15., and stat. 7 Geo. III. c. 21. (*h*) But upon the principle above-mentioned, viz. that the Irish merchants, growers, and manufacturers, might not undersell those of Great Britain, nor have more than an equality in this colonial trade, these concessions were only made upon the condition that the Irish legislature should pass such act or acts as should equalize the duties and drawbacks of the same goods in the two kingdoms, so as they be not exported from Ireland with less incumbrance of duties or impositions than shall remain on them when legally exported from Great Britain. (s. 2.) As the following Irish parliament executed this condition, the act took effect.

The peace of 1783 necessarily produced a most extensive alteration in our colonial system. The American colonies became independent states; and so much was cut off from the previous subject matter of this division of our navigation law.—Accordingly, from this period to the present time, our colonial law has been much varied.

The first of these new laws was enacted to open the intercourse with America. To this end were passed the two acts of the 23 Geo. III. c. 26., and 23 Geo. III. c. 39.; the first of these statutes repealing the former acts by which the intercourse had been prohibited, whilst the latter act empowered the king in council to make such regulations with respect to duties, drawbacks, and otherwise, as should appear most useful. This act being temporary, and passed for experiment, was continued by an annual act to the 28 of Geo. III., with no other alteration than that the same discretionary power of the king in council was extended to the British colonies in America, so far as regarded iron, hemp, sail-cloth, and other articles the produce of the Baltic. The 27 of Geo. III. c. 7. declared the forfeiture of

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(*h*) 20 Geo. III. c. 10. s. 1, &c.

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any ship and goods, where such goods, being the growth and production of the United States, were imported into the West India islands, in any other manner than by order of his Majesty in council or other law. The 28 Geo. III. c. 5. extended this forfeiture to the before mentioned articles from the Baltic. Another section of the same act prohibited the lumber trade between the United States and the West India islands, by enacting that no flour, bread, rice, or lumber of any sort, should thereafter be imported from any foreign or West India island, unless by the licence of the governor, in council granted, under the necessity of the case.

In the year 1788, all these laws were consolidated into one act, stat. 28 Geo. III. c. 6. which now contains nearly the whole of the law regarding the intercourse of the British colonies with the United States. This law regulates both the imports and the exports. With respect to the imports it enacts, that no goods or commodities whatever shall be brought from the United States into any West India island, except only the following articles, viz. tobacco, pitch, tar, turpentine, hemp, flax, masts, yards, bowsprits, staves, heading boards, timber, shingles, and lumber of any sort; horses, neat cattle, sheep, hogs, poultry, and live stock of any sort; bread, biscuit, flour, pease, beans, potatoes, wheat, rice, oats, barley, and grain of any sort; such commodities being of the growth or production of any of the territories of the United States; and these are not to be brought but by British subjects, and in British built ships, owned by his Majesty's subjects, and navigated according to law, under the same penalty of forfeiting the ship and cargo. (*i*) As respects the exports, the statute enacts that all goods, not prohibited at the time of

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(*i*) Sect. 14. enacts, that no goods of the United States shall be imported into Quebec by sea or coastwise: but bread, &c. &c. may be imported by order in council in case of necessity, for the supply of persons engaged in the fisheries, 29 Geo. III. c. 16. 30 Geo. III. c. 8.

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the act to be exported to Europe, and also sugar, molasses, coffee, cocoa nuts, ginger, and pimento, may be exported from the West India islands to the United States, by British subjects, and in British built ships, and navigated according to law:—a due bond to be given that they shall be so landed. An exception, however, is made in this act in favour of American ships taking a lading of salt from Turk's islands, the master making the usual entry upon oath, and paying a tonnage duty 2*s*. 6*d*. per ton. And, to preclude the possibility of this communication being employed as a cover for smuggling, no other goods or commodities, except salt, are to be exported from those islands, either to the British West Indies, or Great Britain, or Ireland. The 44 Geo. III. c. 101. extended the trade of salt in American vessels to the ports of Nassau, Exuma, and Crooked island, all in the Bahamas: and the 57 Geo. III. c. 42. continued this privilege to the 25th March 1819. The next sections in this act make the two important provisions; first, that the goods so allowed to be brought directly from America should not be brought from any foreign West India island, except under the usual licence of the British governors granted for a limited time, and in cases of public distress; and, secondly, that such goods should not be imported from the United States into the provinces of Nova Scotia, or New Brunswick, the island of Cape Breton, St. John's, or Newfoundland; but, under the same circumstances of a licence by the British governor, granted in case of distress, and for a limited time; thirdly, planks, staves, horses, sheep, and live stock of any sort, corn, &c. may be so imported from the United States. And for the further encouragement of the fishery at Newfoundland, his Majesty in council may authorize the governor of Newfoundland to permit, in case of necessity, bread, flour, Indian corn, and live stock, to be imported from the United States for the supply of the inhabitants and fishermen for the then *ensuing season* only: such importation to be by British subjects, in British built ships, owned by British subjects, and navigated according to law. The province of Quebec is ex-

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empted from this importation by the next statute, viz. the 29 Geo. III. c. 56. which was passed to prevent the abuse of the licences of the colonial governors, under which it had now become a practice to re-export for profit what such licence allowed them only to import for the supply of their own necessity. The 29 Geo. III. c. 56. prohibits such exportation under the pain of forfeiture of vessel and cargo.

The stat. of 31 Geo. III. c. 38. extends the prohibition to import certain enumerated articles into the West India islands, from any foreign colony on the continent of South America. (*k*)

The 29 Geo. III. c. 16., and stat. 30 Geo. III. c. 8. were passed to enlarge the provisions of stat. 28 Geo. III. c. 6., with respect to the imports from the United States to Quebec: they added, pease, beans, potatoes, wheat, &c. to the articles before permitted to be imported. Stat. 33 Geo. III. c. 50. was passed to confer a similar enlargement, as respected the import of timber, to the trade from South America. This statute enumerates several species of timber which it allows to be imported in British ships from South America, and from Trinidad and Porto Rico; the principal are mastic wood, and bastard mahogany. The

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(*k*) The following are the enumerated articles:—tobacco, pitch, tar, turpentine, hemp, flax, masts, yards, bowsprits, staves, heading boards, timber, (the importation of certain timber from South American islands is permitted by 33 Geo. III. c. 50.) shingles, or lumber of any sort; bread, biscuit, flour, pease, beans, potatoes, wheat, rice, oats, barley, or grain of any sort, 31 Geo. III. c. 38, s. 1. By 51 Geo. III. c. 47. s. 5., and 56 Geo. III. c. 91. s. 5., certain kinds of timber, and lumber of all sorts, are allowed to be imported from the Portuguese colonies into the West India islands, provided they be imported as supplies. But such articles are not to be exported from any such islands or colonies, on pain of forfeiture of goods, ship, &c. By 58 Geo. III. *c.* 19., scantling, &c. may be imported in foreign ships into ports, to be approved of by his Majesty, in Nova Scotia or New Brunswick, subject to such rules as his Majesty shall think fit.

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same act allows the importation of tar, pitch, and turpentine, of their own growth and manufacture, from the United States into Nova Scotia and New Brunswick in British ships. And stat. 30 Geo. III. c. 29. s. 2. in furtherance of the same object, allows goods the produce of countries bordering on the province of Quebec, and legally imported into that province, by land or inland navigation, to be imported from thence into Great Britain, in like manner as if they were the produce of Quebec.

It has been before stated, that stat. 23 Geo III. c. 36. empowered his Majesty from time to time to issue orders in council for regulating the trade with America. A brief review of these orders will here be necessary. It is expedient in order to shew the gradual alteration of the colonial system, from the year 1783 to the present time.

The first and second of these orders were dated in May and June 1783, which substantially put the American trade upon the footing of the other foreign trade of Great Britain, inasmuch as they allowed the importation of all articles of the growth of the United States into Great Britain, in ships of the United States or British. A third order, dated in July 1783, and another dated in September of the same year, first regulated the trade between our colonies and the United States; but were followed almost monthly by others, the detail of which becomes unnecessary, as they were all consolidated in an order of council dated 26th of December, 1783, containing, for the first time, the whole regulation for the American trade, both with Great Britain and the colonies.

The first subject of observation in this order is, that in enumerating the goods allowed to be imported from the United States into Great Britain, namely, all articles the growth of the United States, it now added the material limitation, *being unmanufactnred goods;* and the further limitation, the importation of which into this kingdom is

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not prohibited by law, (except oil). It directs that tobacco might be landed upon paying the old subsidy, and then be warehoused upon bond. But it takes away a former allowance for prompt payment of the old subsidy. The next provision of this important order of council regulates the trade between our West India islands and America: it allows the exportation from those islands to the United States of rum, sugar, molasses, coffee, cocoa nuts, ginger, and pimento, by British subjects, in British built ships, and navigated according to law, on payment of the like duty, and subject to the like regulations, as if exported to a British colony in America. With respect to importations, it directs that pitch, tar, turpentine, hemp, flax, masts, yards, and bowsprits; staves, heading-boards, timber, shingles, and all other species of lumber; horses, neat cattle, sheep, hogs, poultry, and all other species of live stock and live provisions; pease, beans, potatoes, wheat, flour, bread, biscuit, rice, oats, barley, and all other species of grain, being the growth of the United States, might be imported by British subjects in British built ships, navigated according to law, from the United States to any of the West India islands. In April 1785, an order of council greatly restricted the lumber trade. It was allowed during such time only as should be deemed necessary for the supply of the inhabitants; and no goods or commodities whatever, being of the manufacture of the United States, were to be imported into the province of Quebec.

An order of council, of 1789, added wheat to the articles excepted from importation, on account of an alarm as to the injury which the American crops had received from the Hessian fly. But in 1790, liberty was given, as before, to import wheat from the United States. (*l*) Upon the basis and regulations of these orders, which were occasionally extended or narrowed, and supported by annual acts of con-

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(*l*) Reeves on shipping, 288.

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tinuance, the trade with America was carried on till the year 1796. It was now deemed expedient to settle the trade between the two countries by treaty; accordingly, the 37 Geo. III. c. 97. was passed, by which liberty was given to import into this kingdom directly, from any of the territories of the United States, in British built vessels, conforming in all respects to the regulations of law, as to their navigation and registry, or in American built ships, &c., owned by American subjects, all articles of the growth, production, and manufacture of the United States, not otherwise prohibited by law, upon the payment of such duties of custom and excise, as attached upon like articles imported in British ships from any foreign countries. This act contains several other provisions, which become unimportant under the present head.

This statute permitted the importation of pig-iron, bar-iron, pitch, tar, turpentine, rosin, pot-ash, pearl-ash, mahogany, masts, yards, and bowsprits, provided they were of the growth or manufacture of the United States; and all unmanufactured goods and merchandise whatsoever, not prohibited by law to be imported, with the usual restrictions as to the built and ownership of the vessels importing them. In order to communicate to Ireland the same trade with America, the 41 Geo. III. c. 95. re-enacted the provisions of this act.

The Commercial Treaty with America expiring in 1805, it was still deemed expedient to maintain the same relations of commerce, and to the same extent. Accordingly, the 46 Geo. III., which was in continuation of a previous act, was passed, continuing the trade between the two countries till June 1807. Upon the expiration of this latter act, an order of council directed, that all its regulations should be observed until other provisions should be made by the legislature; whereupon the 47 Geo. III. was passed, reviving, and continuing to a fixed period, the above-recited acts; and empowering his Majesty to suspend their provisions before the 1st of March, 1808, as he should deem expedient.

Trade with America.

The 48 Geo. III. c. 85. is the next act for regulating the trade with America. By this act goods, which may be lawfully imported from the United States into Great Britain, are to be admitted on payment of the lowest duties payable on the like articles from other foreign countries in British or foreign bottoms respectively; and American tobacco is made subject only to the same duty as tobacco imported from the British colonies; and American snuff to the same duty as European snuff imported from Europe. The like drawbacks are allowed upon the exportation of such goods as on other foreign goods. And British goods, exported to America, are made subject to the like drawbacks as if sent to the British colonies. This act was continued by the 49 Geo. III. c. 59.; and the relations between Great Britain and America remained upon the same footing until the breaking out of hostilities.

American treaty of commerce.

The war in Europe having terminated, a treaty of peace was made between Great Britain and the United States; and a convention of commerce signed in July 1815. The 56 Geo. III. c. 13. was passed to give effect to such parts of this convention as required the sanction of parliament; and, upon the basis of this convention, and the above-cited act, taken in conjuction with the navigation laws, as to the description of vessels to be employed in this commerce, the trade between Great Britain and America at present subsists.

The first article of the convention establishes the liberty of commerce: the second article repeats the same provisions with respect to duties and drawbacks on importation and exportation, contained in the 48 Geo. III. c. 85. The article then declares that the intercourse between the United States and the British West Indies shall not be affected by any of the preceding provisions. It is further

American treaty of commerce.

agreed, that the vessels of the United States shall be admitted, and hospitably received, at the principal settlements of the British dominions in the East Indies; and that the citizens of the United States may freely carry on trade between America and the British East Indies; provided only, that it shall not be lawful for them, in any time of war between Great Britain and any state or power whatever, to export from the said territories, without the special permission of the British government, military or naval stores, or rice. No higher duties or charges are to be imposed on American vessels than upon those of the most favoured European nations; but it is expressly agreed that the vessels of the United States shall not carry any of the commodities of the British East Indies, except to some port or place of the United States where they are to be unladen. The permission granted by this article is not to extend to allow the vessels of the United States to carry on any part of the coasting trade of the British territories; but the vessels of the United States are permitted to touch for refreshment, but not for commerce, at the Cape of Good Hope, the island of St. Helena, or at any place in the possession of Great Britain, in the African or Indian sea. This convention, which was to bind four years from the signature, will expire in July, 1819. (*a*)

It will be scarcely necessary to repeat, that the trade, as regulated by the above convention, can alone be carried on, either with Great Britain or her colonies, in ships built in the countries of the United States, (or in vessels which have been condemned as prize,) owned by the subjects of the United States, and whereof the master, and three-fourths of the mariners, at least, are American subjects. The goods imported, likewise, must be of the growth, produce, or manufacture of the United States, 49 Geo. III. c. 59. The export duty on goods shipped direct from Great Britain to the United States, is the same, whether they are shipped in British or in American built ships, 57 Geo. III. c. 58. But this act is li-

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(*a*) It has been since renewed and extended.

mited to expire with the convention of commerce. The third article in the convention, which opens the East India trade to the United States, is confirmed by the 56 Geo. III. c. 51., but is likewise confined to the duration of the treaty of commerce.

American treaty of commerce.

The commerce between America and the British colonies, upon which we have partly touched in the previous review, is regulated by 28 Geo. III. c. 6., to which we have before referred; and the 56 Geo. III. c. 91. extends all the privileges of the 28 Geo. III. to the colonies of Demerara, Berbice, and Essequibo. But it will be necessary briefly to point out the divisions which the late treaties of peace have established with regard to foreign colonies, before we enter into a more detailed review of their commerce; and for this purpose we shall consider them under the heads of—1st, the British West Indies; 2d, the ceded colonies; and, 3d, British America.

British West Indies.

The British West Indies (*m*) claim our first attention:—The trade between Great Britain and these colonies is perfectly free, subject to the regulations of 7 and 8 Will. III. c. 22.; but in order to prevent the establishment of particular manufactures, in which the colonists might be induced to engage to the injury of the British export trade, hats, wool, and woollen manufactures, are not allowed to be exported. The colonists may make them for their own consumption, but very severe penalties are enacted to prevent their exportation from any British plantation. In the same manner, by the 10 and 11 Will. III. c. 10., it is forbidden to export wool or woollen manufactures, the product of any of the plantations. (*n*)

5 Geo. II. c. 22., 10 and 11 Will. III. 46 Geo. III.

(*m*) The British West Indies, including the ceded colonies, comprehend Antigua, Barbadoes, Dominica, Grenada, Jamaica, Montserrat, Nevis, St. Kitt's, St. Lucia, St. Martin's, St. Vincent's, Tobago, Trinidad, Tortola, the Bahamas, Bermudas, Demerara, Berbice, Essequibo, Honduras.

(*n*) 49 Geo. III. c. 18., permits wool, being the product of any of the British plantations in America, to be exported to the United Kingdom. This is a temporary act, and expires 25th March, 1819.

Colonial trade.

Since the establishment of the government of the United States, the trade of the British West Indies, as we have previously shewn, has been placed under particular restrictions with respect to their intercourse with that country. The 28 Geo. III., which we have before cited, regulates the trade between the United States and the colonies, and confines it to such articles as the colonies did not cultivate, or did not produce in sufficient quantities for their own consumption. These articles, however, are not to be imported but in British ships, owned by British subjects, and navigated according to law. Some modern statutes (*o*) permit the goods enumerated in the 28 Geo. III., to be imported into Bermuda in foreign ships belonging to any country in amity with his Majesty, and exported from thence to any of his islands or dominions in the West Indies. And a more recent statute (*p*) permits the importation of fruit and vegetables in the like ships, being the produce of the country whence they are brought; and the exportation of rum and molasses to the same countries in vessels of the like description.

The articles allowed to be exported from the West India islands in British ships to the United States, are, sugar, molasses, coffee, cocoa nuts, ginger, and pimento: (*q*) sugar, coffee, rum, and molasses, are allowed to be exported from Bermuda in foreign ships; (*r*) and American vessels are likewise permitted to enter certain ports in the Bahama islands, to be laden with salt. (*s*) The 58 Geo. III. c. 27., permits the importation of tobacco, rice, grain, pease, beans, and flour, into any of his Majesty's colonies or plantations, in the West Indies, or on the continent of South America, in British built ships, owned, registered, and navigated, according to law, from any colony in the West Indies, or on the continent of America, under the dominion of any European sovereign or state.

(*o*) 52 Geo. III. c. 79. 53 Geo. III. c. 50.

(*p*) 57 Geo. III. c. 28.

(*q*) 28 Geo. III. c. 6.

(*r*) 57 Geo. III. c. 28.

(*s*) See ante, page 40.

Colonial trade.

But for the benefit of commerce, and particularly for the sake of enlarging the sale of our own commodities, by encouraging return cargoes, and the system of barter amongst merchants, it has been found expedient gradually to relax the former restrictive system, with respect to a great many of the enumerated commodities. Upon this principle the sugar colonies are permitted to export many of those enumerated commodities directly to Malta and Gibraltar; and, upon the same principle, the merchants of Malta and Gibraltar are allowed to export many European articles directly to the same sugar colonies, and to Newfoundland, Bermuda, and the colonies in North America; also oranges and lemons from Madeira, and the western islands. Upon a similar principle, (the encouragement of the fisheries,) the ships of our American colonies are allowed to take a variety of articles from the ports of Europe south of Cape Finisterre. As none of the countries south of Cape Finisterre have any competition with England, with respect to manufactures, it is very properly regarded, that the British fisheries are more benefited by departing from the restriction of the navigation laws, than our manufactures are injured.

By the 58 Geo. III. c. 19., his majesty is authorized to open ports in Nova Scotia and New Brunswick, for the importation of lumber, cattle, corn, provisions, and other articles in British ships, or ships belonging to the subjects of any state in amity with his Majesty. But none of the articles are to be imported in foreign vessels, unless they are of the produce of the countries to which the vessels importing the same shall belong. The act also allows the exportation of certain goods from those ports to foreign countries, either in British or foreign vessels; but all such exportations are to be made in vessels belonging to the country to which the goods are to be exported.

Experience had, indeed, proved, that our colonial system, as respected the West India islands, was a powerful impediment to the growth of our foreign commerce, and

Colonial trade.

had impeded our manufactures to a greater degree than it had promoted our navy. Hence several acts have been passed for opening ports in the West Indies; as likewise many other acts for permitting various articles to be imported into those islands from the colonies of other European sovereigns.

The political principle of Free Ports is briefly this; that it having been found expedient to relax in a certain degree from that double monopoly which constitutes the colonial system, but it being still necessary to guard the fundamental principles of the system, and strictly to retain the licence within the degree which the wisdom of the state has fixed, such trade should be confined to certain ports in the colonies and plantations, called Free Ports, to the end that government and its officers may always have its attention upon them.

Free ports.

To establish these ports, to encourage the trade that might be carried on by means of them, and to put them under suitable regulations, various acts of parliament were passed, from time to time, by the legislature, and they have all been consolidated in the 45 Geo. III. c. 57.

This act, with some unimportant alterations, and with many additions as respects specific ports, constitutes the present law of free ports; and it is therefore necessary to cite it in some detail. It is provided by the three first sections of this statute, that the same articles as were enumerated in stat. 27 Geo. III., viz. wool, cotton wool, indigo, cochineal, drugs of all sorts, cocoa, logwood, fustic, and all sorts of wood for dyers' use, hides, skins, and tallow, beaver, and all sorts of furs, tortoise shell, hard wood, or mill timber, mahogany, and all other woods for cabinet ware, horses, asses, mules, and cattle, being the growth or production of any of the colonies or plantations in America, or of any country on the continent of America, belonging to or under the dominion of any foreign European sovereign or state; and all corn and bullion, dia-

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monds, and precious stones, may be imported from any of the said countries into the several ports of Kingston, Savannah la Mar, Montego Bay, Santa Lucie, Antonio, and St. Ann in the island of Jamaica; the port of St. George, in the island of Grenada; the port of Roseau, in the island of Dominica; the port of St. John's, in the island of Antigua; the port of San Josef, in the island of Trinidad; the port of Scarborough, in the island of Tobago; the port of Road Harbour, in the island of Tortola; the port of Nassau, in the island of New Providence, one of the Bahama islands; the port of Pitt's Town, in Portland Harbour, in Crooked island, another of the Bahama islands; the port of Kingston, in the island of St. Vincent; and the principal port in the island of Bermuda. (s) And in addition to the articles enumerated in the 45 Geo. III. c. 57., the 48 Geo. III. c. 125. permits rice, grain, and flour, to be imported into any of the free ports, in any foreign vessels whatever, manned and navigated by persons inhabiting any of the colonies and plantations from whence such goods are brought. Such importation must be in some foreign sloop, schooner, or other vessel not having more than one deck, and being owned and navigated by persons inhabiting any of the colonies or plantations in America, or countries on the continent of America, belonging to, or under the dominion of, any foreign European sovereign or state. Tobacco of the like growth may be imported in like manner, and then re-exported to the United kingdom, paying on its importation here the same duty as tobacco of our West Indies, or of the United States. So much of this act as confined the trade to vessels of only one deck, was repealed by the 50 Geo. III. c. 21. This latter act was merely temporary: but at length

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(s) By 47 Geo. III. c. 34., the port of Amsterdam, in the island of Curaçoa, is made a free port; and the like goods are permitted to be imported and exported as at San Josef, in Trinidad. And 49 Geo. III. extends the benefit of a free port to Falmouth, in Jamaica. And the 57 Geo. III. c. 74. makes Port Maria, in Jamaica, and Bridge Town, in Barbadoes, free ports.

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the legislature deemed it expedient to make it perpetual, by the 54 Geo. III. c. 48.

The act in its three next following sections then proceeds to such of the above ports as are constituted special free ports, for the importation of foreign sugar and coffee. It is made lawful to import into the port of Nassau, in the island of New Providence, into the port of Pitt's Town, in Portland Harbour, in Crooked island, and into such other port or ports in the Bahama islands, into the principal port in the island of Bermuda, and into such port or ports in the islands called Caicos, as shall be approved by his Majesty in council, sugar and coffee, the produce of any foreign country or plantation, in such foreign ships and vessels as are above described, which sugar and coffee may be again exported free of duty. All sugar and coffee imported from the above-mentioned special free ports into this kingdom, is to be treated as sugar and coffee not of the British plantations.

The next section provides, that no commodities, other than those above-mentioned, shall be imported from such foreign places in foreign ships.

The importation into the free ports is thus regulated by the above sections. The act then proceeds to regulate the exports. It permits the exportation from these free ports, in the before-described foreign vessels, of *rum* of the produce of any British island, and of *negroes* (*t*) which had been imported in any British built ship or vessel; and of all manner of goods, wares, or merchandise, which shall have been legally imported into the island, except masts, yards, or bowsprits, pitch, tar, and turpentine; and also except such iron as shall have been brought from the British colonies or plantations in America.

(*t*) The exportation of negroes is now prohibited by the acts for abolishing the slave trade.

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The act likewise permits the exportation in British ships and vessels, from any of the free port islands, to any British colony or plantation in America or the West Indies, of any goods or commodities whatever, of the manufacture of Europe; and also any goods which shall have been legally imported into those islands from any of the foreign plantations or countries before-described. All the free port articles, first enumerated, may be exported to the United Kingdom, conforming to the regulations of stat. 12 Car. II. c. 18., stat. 22 and 23 Car. II. c. 26., 7 and 8 Will. III. c. 22., and stat. 20 Geo. III. c. 10. But no East India goods are allowed to be exported from any of the free ports to any British colony in America, or the West Indies; and if any foreign ship shall arrive at a free port with East India goods, such goods and the ship are liable to forfeiture.

To facilitate the trade of the free ports, no custom-house fee is to be demanded of any foreign vessel, either upon importation or exportation.

By 58 Geo. III. c. 27. tobacco, rice, grain, pease, beans, and flour, may be imported into any of his Majesty's colonies in the West Indies, or on the continent of South America, for the supply of the inhabitants, in British built ships, &c. And pease and beans, of the growth of such foreign European colonies, may be imported into any ports in the British colonies of the West Indies, mentioned in the several acts of parliament, by which such ports are opened to a free trade, and under the rules and regulations prescribed by those acts. (*u*) And in order to encourage the exportation of salt from the Bahama islands, any foreign vessel described in the 45 Geo. III. c. 57., may come in ballast into any port in those islands, and export the

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(*u*) See 45 Geo. III. c. 57., 46 Geo. III. c. 72., 49 Geo. III. c. 22. 52 Geo. III. c. 99, 57 Geo. III. c. 74., 50 Geo. III. c. 21., 52 Geo. III. c. 99., and 54 Geo. III. c. 28.

Colonial trade.

articles allowed by the said act to be exported; and also salt, subject to the duty of tonnage, and under the regulations imposed by 28 Geo. III. c. 6., 52 Geo. III. c. 99. American vessels are likewise allowed to enter in ballast certain ports in those islands to be laden with salt, 57 Geo. III. c. 74. Any of his Majesty's subjects are likewise permitted to export, in British built vessels, navigated according to law, from any of the islands in the West Indies, or plantations on the continent of America, any goods of European manufacture, under the regulations of the general free port act (*x*) This act is an extension of the 45 Geo. III., which confined such general traffic to certain islands only; and a later act extends the same privilege to the island of Newfoundland. (*y*) It is scarcely necessary to add, that the object of these acts was to promote a commercial intercourse and traffic between the several colonies and plantations, and to give to any market, which was overstocked with European manufactures, a relief by seeking a sale or barter at another.

Ceded colonies.

The ceded colonies, according to the division we have made, are Malta, the Isle of France, St. Tobago, St. Lucie, the Cape of Good Hope, Berbice, Demerara, and Essequibo. By the 57 Geo. III. c. 36., Malta, and its dependencies, are to be deemed and taken to be in Europe. The isle of France and its dependencies are comprehended under the general regulations of our navigation laws; and St. Lucie and St. Tobago are placed upon the same footing as the British West Indies. The three latter colonies having been conquered from the Dutch, and ceded to England by the late treaty, (August, 1814,) it became necessary to put them under similar regulations with the British West Indies; but, at the same time, to allow certain advantages to the subjects of the king of the Netherlands, which their interest in these plantations, and their connections with the parent state, required. The

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(*x*) 52 Geo. III. c. 100.

(*y*) 57 Geo. III. c. 29.

Ceded colonies.

56 Geo. III. c. 91. was passed with this view: it enacts, that all the benefits, privileges, and advantages, and all the rules, regulations, and restrictions, penalties, and forfeitures, in 28 Geo. III. c. 6., with respect to his Britannic Majesty's plantations in North America, and the West India islands, the countries belonging to the United States, and between his Majesty's subjects and the foreign islands in the West Indies, shall extend and apply, and be in full force and effect, as to the colonies of Demerara, Berbice, and Essequibo. But the subjects of the Netherlands, being Dutch proprietors in those colonies, are allowed to import all the usual articles of supply for the cultivation of their estates, subject to the restriction, that such articles shall not be imported for the purpose, or employed in the uses of trade. And such proprietors are further permitted to export from the said colonies, direct to the Netherlands, the produce of their estates. The act then describes the persons who are to be deemed Dutch proprietors; and directs that the imports and exports shall be confined to vessels being the property of the subjects of the king of the Netherlands, *wherever* built, and without any restriction as to the mariners navigating the same, for the space of five years, commencing the 1st of Jan. 1816.—But after the expiration of five years, no such trade shall be carried on except in vessels Dutch *built*, and whereof the master, and three-fourths of the crew, shall be subjects of his said Majesty. The Cape of Good Hope having been conquered by his Majesty in the late war, was not treated as a permanent acquisition, but was placed under the special government of the king; and his Majesty was empowered, by several acts of parliament to make regulations touching the trade and commerce of that settlement; 49 Geo. III. c. 17. By the first article in the late treaty with the king of the Netherlands, this important colony is ceded to the crown of Great Britain, Aug. 13, 1814. By the 54 Geo. III. c. 77., the shipping of wine, the produce of that settlement, is specially regulated. And by order in council, dated 24th of September, 1814, it is ordered, that it shall

Ceded colonies.

be lawful, until further order, for all vessels belonging to the subjects of any country or state in amity with his Majesty, to enter into the ports of the settlement of the Cape of Good Hope, and of the territories and dependencies, for the convenience of repairs and refreshment only, in which case a part of the cargoes of such vessels may be permitted to be disposed of, for the purpose of defraying the expences of such repairs or refreshment; and that it shall also be lawful for any vessels belonging to the subjects of any country or state in amity with his Majesty, to import into the ports of the Cape of Good Hope, and of the territories and dependencies, any articles of provisions, with the permission of the governor of the Cape of Good Hope first obtained, by licence, in writing under his signature, which licence he is hereby empowered to grant. And it is further ordered, that goods the growth, produce, or manufacture, of the countries to the eastward of the Cape of Good Hope, legally imported into the said settlement, or into the territories or dependencies thereof, may be exported from the said settlement, &c. to the ports of the United Kingdom, subject to the regulations in 53 Geo. III. c. 155., or to any places to which a trade in such articles is permitted to be carried on, from the said settlement, &c. under the provisions of 54 Geo. III. c. 34., and subject to the regulations in the said act, in British vessels, or in such vessels that shall have been built within the territories belonging to the East India Company, or in the ports under the immediate protection of the British flag in the East Indies.—And that it shall in like manner be lawful to export from the said settlement of the Cape of Good Hope, or its territories or dependencies, in British vessels, or in such vessels that shall have been built within the territories belonging to the East India Company, or in the ports under the immediate protection of the British flag in the East Indies, to any places to which trade may be lawfully carried on from the said settlement, or its territories or dependencies, any articles of British or European produce, or manufacture, which shall have been legally imported into the said settlement, &c.; provided, however, that nothing in this order shall extend to permit a trade in tea, between the Cape of Good Hope, or its territories, or dependencies, and the countries to the eastward thereof, or from the said settlement, &c. to the ports of the United Kingdom; nor to permit any vessel under the burthen of 350 tons to export from the said settlement, &c. to the ports of the United Kingdom, any articles the growth, produce, or manufacture, of any countries situated within the limits of the East India Company's charter; and that the trade and commerce to and from the said settlement, &c. shall be subject to such of the laws of trade and navigation, and the regulations thereof, as would have affected the same, if this order had not been made, except as far as such laws are contrary to this present order.

The acts referred to in this order of council preserve the rights of the East India Company, in favour of whose exclusive commerce it is provided, that the Cape of Good Hope should be construed to be within the limits of their charter, 57 Geo. III. c. 95.

The 57 Geo. III. c. 1. continues to his Majesty in council the same power to regulate the trade and commerce, to and from all islands, colonies, or places, belonging to his Majesty, in Africa, or Asia, to the eastward of the Cape of Good Hope; notwithstanding the provisions of any act of parliament which may be construed to affect the same: and goods imported contrary to any orders in council so made are to be deemed forfeited. This latter act will expire on the 5th of July 1820.

British America.

With respect to British America, the last division of our colonies, the trade, with very few exceptions, stands upon the same principles as those which regulate the commerce of our West India Islands. (z)

(z) British America comprises Hudson's Bay, Newfoundland, coast

British America.

For the benefit of the fisheries, the 4 Geo. III. allowed salt to be imported from any port of Europe into the province of Quebec, in the same manner as salt may be imported into New England and Newfoundland, by 15 Car. II. c. 7. The act of 4 Geo. III. being a temporary act, and continued as occasion required, was made perpetual by 48 Geo. III. c. 22. His Majesty's subjects are likewise permitted to export from any of the colonies and plantations in British America any article of their manufacture or produce, or any goods which they have legally imported, direct to Malta and Gibraltar, in British built ships, owned and registered according to law, 55 Geo. III. c. 29., 57 Geo. III. c. 4.: and, as we have before had occasion to observe, oranges and lemons, the growth of the Azores and Madeiras, may be shipped and laden at those islands respectively for exportation, direct to any part of British America. But such trade is confined to British ships, built and navigated according to law, 57 Geo. III. c. 79.

In the same manner, for the encouragement of the fisheries, and for the convenience of barter and exchange, without compelling a more circuitous course, vessels from the British colonies in North America, arriving with the produce of those colonies at places in Europe, south of Cape Finisterre, are allowed to take for exportation direct to such colonies fruit, wine, oil, salt, or cork, the produce of Europe, 51 Geo. III. c. 97. Canada is further allowed to export to Europe, within the said limits, corn, grain, lumber, &c. without the usual certificate of such commodities being of the growth or produce of that province, and without any certificate being required of the country from whence they came. But no fish is to be exported unless it be the produce of the British fisheries, 51 Geo. III. c. 97. No goods of the United States, as we have previously

of Labrador, Canada, Cape Breton, Prince Edward's island, New Brunswick, and Nova Scotia.

British America.

shewn, can be imported into Quebec, either by sea or coastwise, except bread, flour, &c., by order of council, in case of necessity, for the supply of persons carrying on the fisheries, 28 Geo. III. c. 6. And no goods, except of the growth, produce, or manufacture, of the United States, are allowed to be brought into Upper or Lower Canada, by inland navigation, or land carriage. But goods of countries bordering on Quebec, brought into that province by land or inland navigation, may be imported into Great Britain or Ireland as of the growth of Quebec, 30 Geo. III. c. 29., 39 and 40 Geo. III. c. 67.

By 2 Geo. III. c. 24., salt may be imported from any part of Europe, into the colonies of Nova Scotia and New Brunswick; but no goods whatever are permitted to be imported from the United States of America into the before-mentioned colonies, or the islands of Cape Breton, St. John's, or Newfoundland; or into any country or island within their respective governments, 28 Geo. III. c. 6. But the 33 Geo. III. c. 50. makes it lawful to import pitch, tar, and turpentine, the production of any of the territories of the United States, provided such importation be made by British subjects, and in British vessels. And by 48 Geo. III. c. 125., the governors of these provinces and islands, for the time being, may authorise the importation of the articles, enumerated in the 28 Geo. III. c. 6., for a limited time, from any of the territories of the United States. In the same manner upon any pressing want, any articles of the first necessity may be imported from the United States; but the principal officers and council of these provinces are to determine upon this necessity; and the importation is strictly confined to British ships, *built*, owned, and navigated, according to law. His Majesty in council is further empowered to authorise the governor of Newfoundland to import, in case of necessity, bread, flour, and live stock, from any of the territories of the United States; but the vessels employed in such licensed traffic

British America.

must be British built, owned and navigated according to law, 28 Geo. III. c. 6. So by 51 Geo. III. c. 62., rum and spirits, the produce of his Majesty's sugar colonies, legally imported into the island of Bermuda, may be exported from thence into the provinces of Nova Scotia and New Brunswick, the island of Cape Breton, Prince Edward's island, and the island of Newfoundland. And by 58 Geo. III. c. 19., the articles therein enumerated, viz. timber, cattle, and supplies of the first necessity, are permitted to be imported into Nova Scotia, or New Brunswick, in British built vessels, or in any vessels belonging to the subjects of any state in amity with Great Britain. But the articles imported are required to be of the growth of the country to which the vessel importing the same shall belong. And, in case the markets shall become over stocked, liberty is given to re-export them in British built vessels. (*b*)

By s. 6. his Majesty is empowered, by the advice of his privy council, to make such regulations for the importation and exportation of goods and commodities, with such penalties and forfeitures as it may be deemed expedient to annex. This last act will expire in May 1821.

As it is necessary in a work professedly treating of the whole of any subject, to comprehend all the public acts of the legislature, relating to such subject, we have been compelled, in the preceding pages, to be more full and minute than may suit the occasion of persons referring to it for instruction on a particular point. In order, therefore, to adapt ourselves to such readers, we shall endeavour to comprehend the previous doctrine in the following summary; and for the convenience of practice shall condense it in the form of rules.

(*b*) It may be laid down as a general rule, that when an act of parliament confines the importation or exportation of articles to British built vessels, it further requires such vessels to be owned, registered, and navigated, according to law.

RULE I.

Colonial trade.

Ships permitted to trade to and from British plantations.

The rule under this head is, that no goods or commodities shall be imported into, or exported from, any colony or plantation in Asia, Africa, or America, belonging to, or in possession of, Great Britain, but in British built ships, owned by British subjects, and navigated by a master, and three-fourths, at least, of the mariners, British subjects, 7 and 8 Will. III. c. 22.

Except as follows:—Wool, cotton, indigo, cochineal, drugs of all sorts, cocoa, logwood, fustic, and all sorts of wood for dyers, hides, skins, and tallow; beaver and all sorts of furs, tortoise-shell, hard wood, or mill timber, mahogany, and all other woods for cabinet wares; horses, asses, mules, and cattle, (being the growth or production of any of the colonies or plantations in America, under the dominion of any *foreign European state*,) and all coin, bullion, and diamonds, and precious stones; and also tobacco, being the growth or produce of any island in the West Indies, or of any country on the continent of America, under the dominion of any foreign European sovereign or state, *may be imported* from any of the said colonies or plantations into the *free ports* (enumerated in page 51,) in any *foreign* vessel whatever, of any tonnage, being owned and navigated by persons inhabiting any of the said colonies or plantations in America, or countries on the continent of America, belonging to, or under the dominion of, any foreign European sovereign or state, 45 Geo. III. c. 57., 49 Geo. III. c. 22., 52 Geo. III. c. 99., 57 Geo. III. c. 74.—Sugar and coffee likewise, the produce of any foreign colony or plantation, may be imported into Port Nassau, in New Providence; into the port of Pitt's Town, in Crooked island; into the principal port of the islands of Bermudas; and such ports of the islands called Caycos, as shall be approved by his Majesty in council.

His Majesty in council may also permit the importation into the port of Road Harbour, in Tortola, and the exportation thence to this kingdom, of all such articles above-mentioned, as may be imported into the port of Nassau, 46 Geo. III. c. 72.

In addition to the articles above enumerated, by the 48 Geo. III.

Colonial trade.

c. 125., rice, grain of all sorts, and flour, of any colonies or plantations in America, belonging to any foreign European state, may be imported into any of the free ports in the British West Indies, particularly named in the above-mentioned act, of the 45 Geo. III. (and other free port acts) in any foreign vessel whatever, being manned and navigated by persons inhabiting any of the colonies or plantations belonging to any foreign state.

So far as to *imports*.—In return, such vessels may export from the said ports to any of the colonies or plantations in America, belonging to some foreign European state, the following articles, viz. rum, the produce of any British island, and all manner of goods which shall have been legally imported into the said islands, except masts, yards, and bowsprits, pitch, tar, turpentine, and also except such iron as shall have been brought from British colonies or plantations in America. Salt may likewise be exported from the Bahamas in ships belonging to the United States.

RULE II.

Exportation of British colonial produce from British colonies.

No sugar, tobacco, cotton wool, fustic, or other dyeing woods, rice, molasses, copper ore, coffee, pimento, cocoa nuts, whale fins, raw silks, hides or skins, pot or pearl ashes, iron, or lumber of the growth, production, or manufacture, of any British plantation, in Asia, Africa, and America, may be transported to any place whatsoever, other than to some British plantation, or to Great Britain, or to Ireland.

1. *Except*,—Sugar, coffee, rum, and molasses, the produce of any British colony in the West Indies, imported into Bermuda in any British ship, may be exported from certain ports in that island to the territories of the United States, in any *foreign* ship belonging to any country in amity with his Majesty, above the burthen of sixty tons; 52 Geo. III. c. 79, 53 Geo. III. c. 50, 57 Geo. III. c. 28. And tobacco, lumber, &c. of the growth and production of the United States, legally imported into Bermuda, may be exported thence to the West Indies, in British built ships; 52 Geo. III. c. 79, 53 Geo. III. c. 50. By 56 Geo. III. c. 91., Dutch

Colonial trade.

proprietors in Demerara, Berbice, and Essequibo, may export the produce of their estates, on board Dutch ships, to the Netherlands, but *no where else.* Iron and lumber, the production, &c. of the British plantations in America, may be landed in any British colony in America, Africa, or Asia, under the regulations of 4 Geo. III. c. 15. and 5 Geo. III. c. 45.; but in no part of Europe except Great Britain and Ireland.

2. *Exception.*—Sugar, molasses, coffee, and cocoa nuts, which, together with ginger, pimento, and all goods and commodities, which, in the year 1788, were not prohibited to be exported in any foreign country in Europe, may be exported from the British West India islands to the United States. But this trade (with the exception of salt from the Bahama islands, as before-mentioned,) must be carried on in British built ships, owned, and navigated according to law, 28 Geo. III. c. 6.

3. *Exception.*—His Majesty's subjects may likewise export from any of our colonies and plantations in America, to Malta, and Gibraltar direct, sugar, coffee, cocoa, pimento, rum, molasses, indigo, ginger, fustic, and other dyeing goods, being the produce of any such colony or plantation, in British built ships; 55 Geo. III. c. 29. and 57 Geo. III. c. 4, &c.

4. *Exception.*—Lumber may be exported from the British colonies, and carried to the Madeiras, the Azores, or any part of Europe to the southward of Cape Finisterre; and sugar, coffee, and cocoa, being the growth and produce of any of his Majesty's sugar plantations, may be exported from thence *direct* to any port in Europe to the southward of Cape Finisterre, under certain regulations; 52 Geo. III. c. 98. All other goods, not before enumerated, being the growth, product, or manufacture, of any British colony or plantation, may be transported directly to any place whatever.

5. *Exception.*—Hops must not be carried to Ireland, 5 Geo. II. c. 9..; nor rum, nor other spirits to the Isle of Man, 5 Geo. III. c. 39.; nor rum to Guernsey or Jersey, 9 Geo. III. c. 28.

6. *Exception.*—No hats or felt may be exported from one plantation to another plantation, or elsewhere, 5 Geo. II. c. 22. And no wool, &c. drapery stuffs, or woollen manufactures, may be exported from any of the plantations to any other place whatsoever, 10 and 11 Will. III. c. 10.

Colonial trade.

RULE III.

Exportation of goods, not being British colonial produce, from British colonies.

It is lawful to export in any British ship owned and navigated according to law, from any British colony or plantation in America, or the West Indies, any goods of the manufacture of Europe to any other British colony; also any goods which shall have been legally imported into any of the aforesaid colonies or plantations from any country in America, belonging to, or under the dominion of, any foreign European sovereign or state, from any of the free ports, to Great Britain and Ireland; 45 Geo. III. c. 57, 49 Geo. III. c. 22, 52 Geo. III. c. 99, 57 Geo. III. c. 74.

Exception 1.—Goods, the produce of the East Indies, cannot be exported from any free ports to any British plantation in America, or the West Indies, upon forfeiture thereof, with the ship; 45 Geo. III. c. 57. But tobacco of American States, which may have been taken by fair traffic into any British West India islands, may be thence exported to Great Britain; 29 Geo. III. c. 68. All the articles enumerated in the exception to the first rule, except hard wood or mill-timber, having been legally imported into the free ports, may be exported thence, and brought into Great Britain and Ireland, under the same regulations as goods of the growth of the British colonies, except sugar and coffee, imported into the Bahamas and Bermudas.

RULE IV.

Importation into British Colonies.

No goods or commodities, of the growth, produce, or manufacture of Europe, may be imported into any land, island, plantation, colony, territory or place, belonging to, or in the possession of Great Britain, in Asia, Africa, and America, but such as shall be shipped in Great Britain or

Colonial trade.

Ireland, in British built shipping, owned, navigated, and registered, according to law ; 15 Car. II. c. 17., 39 and 40 Geo. III. c. 67. And no vessel is to clear out from Great Britain or Ireland, except the whole cargo be there laden and shipped *bonâ fide*, and without fraud.

Exception 1.—Salt may be laden in any part of Europe for the fisheries in Newfoundland, Nova Scotia, or Quebec ; and wines, oranges, and lemons, of the Madeiras and Western Islands, or Azores, may be shipped from thence for any of the British colonies or plantations in North America. 4 Geo. III. c. 15. 4 Geo. III. c. 19. 48 Geo. III. c. 22. 57 Geo. III. c. 89.

Exception 2.—Any persons inhabiting in Guernsey or Jersey, may transport directly from thence to Newfoundland, or to any other of the British colonies or plantations in America, wherein the fisheries are now, or shall hereafter be carried on, on board any ship that may lawfully trade there, articles necessary for the fisheries, food, clothing, &c. 9 Geo. III. c. 28. Herrings may be exported in the same manner from the Isle of Man, 12 Geo. III. c. 58. : and tools and implements of fishery, 15 Geo. III. c. 31.

Exception 3.—Fruit and wines, from Malta and Gibraltar, may be imported into any of his Majesty's sugar colonies or plantations in America, or Newfoundland, or Bermuda, or into any of his Majesty's colonies or plantations in North America ; 55 Geo. III. c. 29. 57 Geo. III. c. 4.

Exception 4.—Although no tobacco, pitch, tar, turpentine, hemp, flax, masts, yards, bowsprits, staves, heading-boards, timber, shingles, or lumber of any sort ; bread, biscuit, flour, pease, beans, potatoes, wheat, rice, oats, barley, or grain of any sort, may be imported into any British West India island, (including the Bahamas and Bermudas,) from any foreign West India islands, or from any colony or plantation on the continent of South America, belonging to any European state ; NEVERTHELESS, in case of distress for the supply of the inhabitants, by licence of the governors, or commanders-in-chief, &c. such commodities are allowed to be imported, by British subjects, in British built ships, &c. 28 Geo. III. c. 6., 31 Geo. III. c. 38, 56 Geo. III. c. 91. ; but may not be re-exported. Such licence is to be given for a limited time only.

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Exception 5.—Certain species of timber may be imported in British built ships, &c. into any of the West India islands, from any colony or plantation on the continent of South America, under the dominion of any foreign European sovereign, or from Porto Rico in the West Indies; 33 Geo. III. c. 50. Such timber must be of the growth of the country whence it is imported. And, by 58 Geo. III. c. 27., pease and beans, the growth of any of the colonies or possessions in the West Indies, or on the continent of America, belonging to or under the dominion of any foreign European sovereign or state, may be imported into any of the ports of the colonies and plantations enumerated in 45 Geo. III. c. 57., 46 Geo. III. c. 72., 49 Geo. III. c. 22., 52 Geo. III. c. 99. and 57 Geo. III. c. 74., in vessels of the like description, and subject to the like rules, regulations, and restrictions, as are required by the 50 Geo. III. c. 21., 52 Geo. III., and 54 Geo. III. c. 48. And by the above act, 58 Geo. III. c. 27., tobacco, rice, grain, pease, beans, and flour, may likewise be imported into any of the colonies in the West Indies, or on the continent of South America, (for the *supply* of the inhabitants,) in British *built* vessels, from any colony, &c. in the West Indies, or on the continent of America, under the dominion of any foreign European sovereign or state. (sec. 1.)

RULE V.

Importation from the United States of America into British Colonies.

The rule under this head is, that no goods shall be imported from any of the territories belonging to the United States, into his Majesty's West India islands, (in which the Bermuda and Bahama islands are included,) or into the colonies of Demerara, Berbice, or Essequibo.

Exception 1.—Tobacco, pitch, tar, turpentine, hemp, flax, masts, yards, bowsprits, staves, heading-boards, timber, shingles, and lumber of any sort; horses, neat cattle, sheep, hogs, poultry, livestock of any sort; bread, oats, barley, and grain of any sort; such commodities being the growth or production of the territories of the said States: but the said articles shall not be so imported except by British subjects, and in British built ships, owned, &c. 28 Geo. III. c. 6. 56 Geo. III. c. 91. Except also household

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furniture, &c. by persons intending to settle in the Bahama or Bermuda islands, or in any of the territories belonging to his Majesty in North America; 30 Geo. III. c. 27.—*See likewise some regulations of detail in this act.* The articles enumerated in the first exception may be imported into Bermuda, from the United States of America, in foreign ships, and exported in British. The foreign ships must belong to countries in amity with his Majesty; 52 Geo. III. c. 79. and 53 Geo. III. c. 50., And, by 57 Geo. III. c. 28., fruit and vegetables may be imported in the like ships from the United States of America; and rum and molasses, the produce of any British colony in the West Indies, which shall have been legally imported into Bermuda in British ships, may be exported from Bermuda to the said states, in foreign vessels, under the regulations of the 52 and 53 Geo. III. And, by virtue of, and under the regulations of the last-mentioned acts, sugar and coffee may be exported from Bermuda to the United States in any foreign vessels belonging to any country in amity with his Majesty.—As to other commodities which may be exported from the West India islands into the United States, see Rule II. Except. 2.

Exception 2.—No goods shall be imported from the United States of America, by sea or coastwise, into Quebec; or into the countries or islands within that government; or up the river St. Lawrence from the sea; 28 Geo. III. c. 6.: nor into the provinces of Nova Scotia or New Brunswick, the islands of Cape Breton, Prince Edward's Island, or Newfoundland, or any country or island within their respective governments, 28 Geo. III. c. 6.; NEVERTHELESS, by 33 Geo. III. c. 50., pitch, tar, and turpentine, being the growth or production of the United States, may be imported thence by British subjects, in British built ships, &c. into Nova Scotia, New Brunswick, and the islands of Cape Breton and St. John's. And by 48 Geo. III. c. 125., the governors, &c. of Nova Scotia, New Brunswick, or of the island of Cape Breton or St. John's, may authorise the importation of the articles enumerated in the 28 Geo. III. c. 6. for a limited time, from any of the territories of the United States, for the purpose of the same being re-exported to any other of his Majesty's plantations. The like governors, in case of emergency, may authorise the importation of scantling, planks, staves, heading-boards, shingles, hoops, or squared timber of any sort; horses, neat cattle, sheep, hogs, poultry, or

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live-stock of any sort; bread, biscuit, flour, pease, beans, potatoes, wheat, rice, oats, barley, or grain of any sort, for a limited time; 28 Geo. III. c. 6. In like manner the governor of Quebec may authorise the importation of live-stock, bread, &c. from the United States, for a limited time, for the supply of the inhabitants; 30 Geo. III. c. 8. Such importation to be by British subjects, in vessels British built, owned, navigated, &c. according to law.

Such is the system of the colonial trade, founded upon acts of parliament sweeping and prohibitory in the first instance, but which have gradually been relaxed by the changed condition of the times, the necessities of commerce, the equitable claims of the colonists, and the reasonable rights of foreign and independent nations. It might be expected perhaps that we should advert in this place to some of the licences and Orders of Council during the late war, by which the navigation laws, on particular occasions, were qualified and suspended. But, as such licences and provisions were merely temporary, and passed away with their respective occasions, they are to be regarded rather as war regulations, than as entering into the permanent legislative system of commerce and peace. In every departure from the colonial system which we have had occasion to mark in the preceding pages, it may be observed, that where the legislature have been compelled by the necessities of the times to make a deviation from a former rule, they have still retained such rule, and the principle upon which it was built, constantly within their view: and they have, in most cases, so qualified and restricted the exception which they have been compelled to admit, as to restrain the liberty conceded within the exact limits of the necessity of the case. They have regarded our colonies as one of the main means of maintaining and augmenting our navy and shipping; and, with this purpose, they have endeavoured, with as much jealousy as possible, to retain both the import and exports to ourselves, and in our own ships. If they have been compelled to depart from this monopoly, (for such it is,) in

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some few instances, such departure has only been gradual, and never with the sacrifice of fundamental principles. Thus, if foreign ships have been allowed to import articles of the growth and production of American colonies, under the dominion of any foreign European state, it is a concession only to prevent illicit trade; and it is prevented from breaking in too much upon our navigation system, by requiring that all such ships should be the ships of the country from which the goods are so imported, navigated by its subjects or inhabitants; and that the commodities should be of the growth and production of the country from which they are sent: this is a restriction intended to prevent the carrying trade. And, as it would be a hardship upon such merchants, and an intolerable impediment to commerce, if, after being allowed to import such articles, they were compelled to return in ballast, such vessels are permitted to export the rum of our colonies, of which there must always be an abundance: but are prohibited from taking any of those other articles by which they obstruct or compete with the trade of our own merchants. The exportation of rum is thus an encouragement to the planter; and, though certainly a departure from our former exclusive monopoly of market, is attended with a greater good than the strict observance of the rule.

Again, as the colonies want a continual supply of lumber, provisions, live-stock, &c. which can only be procured cheaply from the United States, and as it is an object to retain the supply of these articles to our own shipping and sailors, it has been deemed prudent to allow sugar, molasses, coffee, &c. to be exported from the British West India islands to the United States direct: but the navigation system is preserved, by requiring such exportation to be by British subjects, in British ships.

Again, for the sake of admitting the merchants of our colonies into a participation in the general trade of the country, and for the sake of procuring a larger consump-

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tion of our own manufactures, the colonies are permitted to become a kind of *depôt* for the supply of each other; as every colony is allowed to export to another, with some few exceptions which we have before pointed out, whatever may have been previously imported into it according to the laws.

Again, with respect to the importation of goods into the colonies, from other places than British ports, the navigation laws are no further departed from than to meet the necessities of our fisheries, and any urgent demand of our colonies for provisions and articles of prime necessity. Wines and fruits of the Madeiras and Azores are permitted, from the evident reason that they do not interfere with the trade of our own merchants and with articles of our own growth and manufacture: so also Malta and Gibraltar are permitted, for local reasons, to have a direct trade with our West India islands; to receive our sugar and coffee, and to return their fruits.

Under any urgent necessities of the colonies, the governor is allowed to authorise, by licence, the importation of lumber and provisions from foreign West India islands, and South America, but only for a limited time; but such importations must be made in general by British subjects, in British built ships.

Under all the above circumstances, it is manifest that this colonial system could not have been adopted with the same effect by any other country than Great Britain, whose capital, whose ships, and whose manufactures, all exist in too great an extent to constitute her exclusive supply of such colonies, and such engrossing of their trade, an injurious monopoly. The colonial merchant and planter have as wide a market, and as numerous purchasers, as their stock requires: their produce is never too large for the demand. The mother country, therefore, enjoys the benefit of the system, whilst the colonies do not suffer. An eminent example of the mischief of a similar monopoly, under other circumstances, may be seen by the relations of Spain and South America. Spain, unable to purchase a large colonial produce, and admitting no one else to purchase, has necessarily impeded the growth of her colonies, by confining their produce to the stock only which the mother country could take, and by purchasing that stock at the price of those who buy from those who are compelled to sell. The British empire, on the other hand, either consuming all, or being enabled to sell it by an extended commerce to other nations, at once encourages the colonies, and advances its own general trade.

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The course of this chapter has now led us to the consideration of such parts of the colonial trade as are purely of a legal nature; and the first enquiry under this head will be, what meaning has the legislature, or usage annexed, to the description in the navigation acts of British *built* ships. The words of the 12 Car. II. c. 18. are, that no goods shall be imported from the plantations but in such ships or vessels as do truly and without fraud belong only to the people of England, or Ireland, &c.; or are of the built of, and belonging to, any of the said lands, islands, plantations, or territories, as the proprietors and right owners thereof, and whereof the master, and three-fourths of the mariners, at least, are English. And the 7 and 8 Will. III. c. 22. requires the ships employed in this trade to be of the *built* of England or Ireland, or of the colonies or plantations, with the like conditions as to the property and navigation as are prescribed by the act of Charles. There is an exception in this act, which we have before pointed out, as to prize ships legally condemned, and foreign ships employed by the commissioners of the navy in conveying stores for his Majesty's service. Such prize ships are, however, required to be the property of Englishmen; and, together with such foreign vessels, to be manned and navigated in the same manner as British built ships. By 26 Geo. III. c. 60. s. 1., a British built ship is declared to be such a ship only as shall have been built in Great Britain or Ireland,

What are to be deemed British *built* ships, &c.

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Guernsey, Jersey, or the Isle of Man, or in some of the colonies and plantations, islands, or territories in Asia, Africa, or America, which, at the time of the building of the ship, belonged to, or were in the possession of, his Majesty, or any ship whatsoever which has been taken and condemned as lawful prize. But such British built ship as shall be rebuilt or repaired in any foreign port or place, to an amount exceeding 15*s.* per ton, is not to be considered as *British* built, unless such repairs shall be proved to have been necessary to enable the ship to perform her voyage. In case of such repairs, the master is required to report to the British consul, or other officer at the port where the vessel is repaired, her state and condition upon *oath:* the ship is to be properly surveyed and a certificate to be obtained from the British consul of the particulars of the repairs, and that they had become necessary. If there be no such consul or officer resident at or near the port, then the survey of the ship is to be made by two persons to be approved of by two known British merchants residing at or near the port or place where the vessel is refitted. The master is to produce to them vouchers of the particulars of the repairs; and their certificate is to be of the same effect as that of the consul or chief officer. And if a vessel is repaired in a foreign port, the master shall, if required, make proof on oath, or by affirmation, of the nature and amount of the expense of the repairs, before the principal officer of the customs, at the first port in his Majesty's dominions at which the vessel shall first arrive; and, if the expense shall exceed 15*s.* per ton, and the master shall not deliver the certificate before-mentioned, the ship shall be deemed *foreign built.* (*c*) Such are the cautious guards which the law has imposed in order to prevent any evasion of the terms British built.

Who are to be deemed British sailors, masters, &c.

And to prevent all doubts as to the various terms made use of in the navigation laws with respect to the persons

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(*c*) 26 Geo. III. c. 60. s. 2.

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who are to be deemed qualified to be masters of British ships, or to be British sailors, seamen, or mariners, it is declared and enacted, by the 34 Geo. III. c. 68., that no person shall be deemed or taken to be qualified to be the master of a British ship, or to be a British sailor, seaman, or mariner, except the natural born subjects of his Majesty, his heirs, and successors; or persons naturalized by, or by virtue of, any act of parliament, or made denizens by letters of denization, or except persons who have become his Majesty's subjects by virtue of conquest or cession of some newly acquired country, and who shall have taken the oath of allegiance to his Majesty, or the oath of fidelity required by the treaty of capitulation, by which such newly acquired country came into his Majesty's possession, s. 6. The same statute confers a qualification upon foreign seamen after three years' service in time of war on board any of his Majesty's ships, who shall obtain certificates of their faithful service and good behaviour from the commanders; or, in case of their death, from the next in rank, and take the oath of allegiance, s. 7. But it also excludes from this capacity every person, however otherwise qualified, who, after he became qualified, has taken, or shall take, the oath of allegiance to any foreign sovereign or state, for any purpose, except under the terms of some capitulation upon a conquest by an enemy, and for the purpose of such capitulation only, s. 8. But no ship or vessel shall be forfeited by reason of the employment of persons so qualified, if the owners can shew that such disqualification of the master was unknown to them or their agents, and that such disqualification of a mariner was unknown both to them or their agents, and to the master. The statute, however, allows the employment as sailors, in the seas of America and the West Indies, of negroes belonging to persons qualified in the manner before-mentioned, if the conditions required by the stat. 34 Geo. III. c. 42. have been complied with; and in the seas to the eastward of the Cape of Good Hope, of Lascars, and other natives of the countries to the eastward of that cape.

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And if any goods shall be imported or brought, exported or carried coastwise, contrary to any of the provisions of this act, the goods, vessel, guns, and furniture, shall be forfeited; and, if any vessel shall sail in ballast, or sail to be employed in fishing on the coast in the manner before mentioned, or being required to be manned and navigated with a master and a certain proportion of British mariners in the manner before directed, shall not be manned and navigated according to the provisions of this act, the vessel, with her guns and furniture, and all the goods on board, shall be forfeited, s. 10. And all goods and vessels forfeited by this act may be seized by the commander of any of his Majesty's ships of war, or any commissioned warrant, or petty officer, specially appointed by him, or any officer of the customs; the forfeiture to be recovered and applied in the same manner as any forfeiture incurred by any law respecting the revenue of the customs, s. 11. And "in case any British ship or vessel shall be found at sea, having on board a greater number of foreign mariners than is allowed by this act, or any law now in force, or hereafter to be made; and the master of such ship or vessel shall produce a certificate of the actual necessity of engaging such foreign mariners in some foreign port, by occasion of the sickness, death, or desertion of the like number of British mariners, or of the same having been taken prisoners during his voyage; and that British mariners could not be engaged in such foreign port to supply their room; and that for the safe navigation of such ship or vessel, it became necessary to engage and employ such foreign mariners, under the hand of his Majesty's consul at the foreign port, where the said foreign mariners were so engaged; or, if there is not any such consul there, under the hands of two known British merchants at such foreign port, it shall not be lawful for any of the persons authorised by this act to make seizures of ships or vessels navigated contrary to the directions of this act, to stop or detain any such ship or vessel so found at sea, or to hinder her from proceeding on her voyage, but such persons shall and are hereby required to

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endorse the certificate so produced, testifying the production thereof, and when and where met with at sea, and that the number of foreign mariners correspond with the certificate of such British consul, or such known British merchants, for the consideration and investigation of the commissioners of his Majesty's customs in England and Scotland respectively, s. 12.

There is in this statute a proviso, reserving to his Majesty the power of issuing such proclamation as he was authorized to make by a statute passed in the last reign, s. 1. and 4., which enables the king at all times, when it shall be found necessary to declare war against any foreign power, to publish a proclamation to permit all merchant ships and other trading vessels and privateers to be manned with foreign mariners and seamen during such war, so as the number of such foreign seamen or mariners do not exceed three-fourths of the mariners at any one time employed to navigate such merchant ship, or other trading ship, or vessel, or privateer; and that one-fourth, at least, of the mariners, or seamen so employed, be at all times natives, or his Majesty's naturalized subjects of Great Britain, sudden death, and the hazard and casualties of war and the seas, saved and excepted.

Since the union of Great Britain and Ireland, regulations similar to those which we have just detailed have been made by the legislature with respect to the navigation of Irish ships by subjects of the United Kingdom, 42 Geo. III. c. 61. s. 1. to 15.

Of the terms, growth, produce, and manufacture in the navigation acts.

The next consideration will be, what is the construction of the words in the navigation acts, *growth*, *produce*, and *manufacture*, and likewise of the term *importing*. The fourth section of the 12 Car. II. c. 18. enacts, that no goods of foreign growth, production, or manufacture, shall be brought into England, Ireland, &c. in English ships, &c. unless shipped or brought from the countries of their said

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growth, production, or manufacture; or from those ports where the said goods and commodities can only be, or are, or usually have been, first shipped for transportation, and from no other places and countries. And the 19 Geo. III. c. 48. explains this section of the statute of Charles; and enacts, that it shall not extend to permit any goods or commodities whatsoever of the growth or production of Africa, Asia, or America, which shall be in *any degree* manufactured in foreign parts, to be *imported* or brought into the kingdom of Great Britain, &c., unless the same shall be so manufactured in the country or place of which the said goods and commodities are the growth and production, or in the place where such goods and commodities can only be, or are first shipped for transportation, and from no other place or country whatever. The penalty is the forfeiture of goods and ship. (*d*)

These words are too precise to require much discussion; but such cases as have arisen upon them will more properly fall under our consideration in the following chapter. The word *growth* applies to natural produce; and *production* and *manufacture*, to articles of human industry and art. The statute of the 19 Geo. III. was meant to guard against evasions; such as the manufacturing of an article in one foreign country, sending it to a second, and thence exporting it to a British port, under the pretext that it was the manufacture of the country whence it was last brought. In any violation of this rule, the privity of the master, or owner to such infringement, is not required to be proved, and this upon two principles; in the first place, that ignorance of the law is an excuse to no one who ought to know the law; and, secondly, because

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(*d*) It should seem that this is meant to be explained as to goods, the growth or production of Africa, Asia, or America, manufactured in foreign parts. But the section is not correctly recited in this act. Thrown silk is no manufacture within the meaning of this act, 2 W. and M. s. 1. c. 9. As to the importation of American drugs, see 7 Ann. c. 8. s. 12.

the admission of such a principle, as the *intention* or good faith of the party, would open the law with too much facility to evasion. The words are negative, absolute, and prohibitory; and make no mention of the privity or consent of the master, mate, or owner.

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Though penalty or forfeiture is, in general, only applicable to cases where there is some crime or guilt, yet they do not necessarily imply either, though punishment always does. Thus in Idle *v.* Vanneck, *Bunbury* 230. and Mitchel *v.* Torup, *Parker* 227; on an information for a ship forfeited for bringing over goods not of the growth, &c. it was held, that privity of the master was not necessary: common reason, however, makes a distinction, whether the goods are a part or not part of the cargo. If a passenger privately brings over a small parcel, it shall be deemed the act of such passenger, and the property of such passenger, and not the act of the master, or part of the cargo, attainting the rest; nor shall the ship be forfeited, *Bunbury*, 232.

What is to be deemed an importation of goods.

The next question is, What shall be deemed an importation?—An importation is, the coming of a vessel into a port, or within the trading limits of a port, for the purpose of disposing of her cargo, either in whole or in part. It is a question of intention, as explained by some manifest act or circumstance. In case of distress for provision, water, &c. where there is no bulk broken, and no act to warrant the suspicion of a pretext, and no infringement of the hovering acts, such entrance by a vessel would not be deemed an importation. But, to constitute an importation, it is not necessary that a vessel should come to a wharf. (*e*) But the bringing of goods in a ship is *primâ facie* evidence of importation, though it may be repelled by proof of a contrary intention; but the act of putting them into

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(*e*) Leaper *v.* Smith, *Bunbury*, 79. Eleanor Hall, *Edwards*, 135.

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a boat for the avowed purpose of landing, is, of course, an importation. (*f*) It is likewise a general principle, that coming into a port with articles on board, not having an ulterior destination, is an importation of such articles; and, if the importation be prohibited by law, nothing short of absolute distress or compulsion can operate as a justification. According to the construction of the navigation laws, *importing* means coming into the importing port with an intention to land the cargo; Foster *v.* Harrison, in Exchequer, cited *Dodson*, 230: but a vessel arriving in a port with a mixed cargo, partly of importable and partly of prohibitable articles, and a clearance which is silent as to any ulterior destination, affords the strongest presumption that it was the intention of the parties to effect an importation of the latter, and requires to be rebutted by the strongest evidence; Tortola, *Dodson*, 124. Attorney-General *v.* Wilson, *Price*, 481. As the general rule is, that the importation of goods is always accounted from the time of the ships' coming within the limits of the port; so, in the case of the Attorney-General *v.* Pouget, upon a question in the Exchequer concerning the payment of export duty, that court was of opinion that goods shipped could not be considered as exported until the ship had cleared the limits of the port; 2 *Price*, 381. (*g*)

As all the subjects of a country are bound to know the laws of a country, so likewise is a foreigner, if he trade with that country: and, if he trade under an insufficient authority, or violate the navigation laws, his ignorance of law will not protect him. It is a part of his business and obligation to learn them.

As the effect of necessity is of course to dispense with these laws altogether in the case of the alleged urgency; such necessity, if allowed at all, must be distinctly pleaded

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(*f*) Adams, Tubbs, *Edw.* 289. (*g*) *Edward's* Appendix, E.

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and supported by strong evidence. It has been before said that *mala fides* in the master, mate, or owner, is not necessary to subject to forfeiture.

An irregular importation, made under ignorance or error, is equally a breach of the law, and equally works a forfeiture. We have before adverted to statutes by which his Majesty is empowered to authorise the governors of foreign colonies and plantations to grant licences for the importation of goods, otherwise prohibited, for a limited time, and for the supply of an urgent necessity. But such governor cannot exceed, upon his own discretion, the particular authority and instructions communicated by the crown. He cannot permit the landing of articles, not permitted by the law, to be imported; it would amount to a power of dispensing with acts of parliament, which the constitution of the country does not allow to the sovereign himself. Add to this, that such a power is expressly taken away by the 46 Geo. III. c. 3., by which such permission is given, and exclusively vested in the crown. Governors are bound by the enumeration of articles which the king, in the exercise of his authority under the above statute, permits to be imported; and they cannot in the slightest degree travel out of that enumeration. (*h*) The old navigation law would embrace the forfeiture of the ship, and the entire value of the cargo; but Americans are entitled by the Intercourse Act, 28 Geo. III. c. 6. (not altered by the late Convention of Commerce, and confirmatory acts of parliament, 56 Geo. III. and 57 Geo. III.) to a moderation of those penalties; extending only to a forfeiture of the ship, and not its articles.

What are to be deemed colonies and plantations.

The last enquiry under the present head is, What is to be understood by colonies and plantations? The Navigation Act employing the words *lands, islands, plantations*, &c. whilst most of the subsequent acts adopt the words, *colonies* or

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(*h*) *Edw.* 301 to 304.

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plantations, 7 and 8 Will. III. c. 22. The legal meaning of a colony or plantation is, any land, territory, island, or possession, *beyond* the sea, belonging to, or under the dominion of the crown of Great Britain; and, not only those that now are, but any such as may hereafter become *permanently* so, by cession or conquest. But Heligoland, being a *depôt* only during the war, and under a temporary subjection to our government, was held to be no part of the British dominions, within the navigation laws, and therefore of course no colony. (*i*) But the islands and settlements in the East Indies, whether deemed to be the property of the East India Company, or immediately of the crown, are all parts of the British dominions, and belonging to the crown of England. As such, they are to be deemed plantations and colonies under the navigation acts, though particular statutes may have assigned them different regulations as to commerce and national character. (*k*)

Several other questions have arisen respecting some general designations or common appellations employed by the navigation acts. Thus in 15 Car. II. c. 7., the term used is the western islands of Azores. And, in some subsequent acts, the words are, western islands, commonly called Azores. A discussion was raised, and submitted to the law officers by the lords of the Board of Trade, whether *Teneriffe* was one of the western islands. It was determined that Teneriffe was not one of the Azores, or western islands, but that it is in Africa. But under this head, viz. what are *colonies* and *plantations*, the discussion has now become practically of no consequence whatever; for if any difficulty existed in former times, and cases arose upon them, every possible question is now set at rest by some

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(*i*) Sarah Gill, Dod. 107.

(*k*) Chalmers *v.* Bell, 3 Bos. and Pul. 606. Lord Alvanley and the Court of C. P. were of opinion, that the clauses in the 33 Geo. III. c. 52. did not repeal the navigation laws as respected the East Indies. None of the subsequent charters of the company have repealed these laws; but see 57 Geo. III. c. 95., which has relaxed them as to some particulars.—*Post.*

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one or other of those numerous treaties of peace made within late years with America and the European States. Thus, in pursuance of late treaties, and by an act of parliament 57 Geo. III. c. 36., Malta and its dependencies are to be taken to be in Europe. We have already shewn that Malta and Gibraltar are permitted to carry on a trade direct with the colonies, under certain restrictions, 57 Geo. III. c. 4.

A question, however, once arose, whether West India produce could be shipped from the islands to Gibraltar; in other words, whether Gibraltar was a colony or plantation within the words of the navigation acts. It was determined that Gibraltar was no colony. (*l*) The construction of the navigation acts, by Lord Ellenborough, on this point, is so able, that we shall give it in his own words:—"It is quite plain," he says, "from the whole scope of the navigation laws, in the time of Car. II., that colonial produce could not legally be shipped from the plantations in the West Indies to any part of Europe, except England, Wales, and Berwick-upon-Tweed; though, since the Union, the privilege has been extended by particular acts. A strong legislative declaration of this is to be found in the stat. 25 Car. II. c. 7. s. 2., which recites the prior permission to carry produce, the growth of the plantations in America, Asia, or Africa, from the places of their growth to any other of his Majesty's plantations in those parts, (Tangier excepted,) without paying duties; and that the inhabitants of divers of those colonies, contrary to the express letter of those laws, have brought into divers parts of Europe great quantities thereof which they vend to foreign shipping, &c. to the hurt and diminution of the customs and trade and navigation of the kingdom; and, for remedy, imposes certain duties on all such commodities, unless bond be given to bring the same to England, or Wales, or Berwick-upon-Tweed, and to no other

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(*l*) Lubbock *v.* Potts, 7 East. 449.

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place; and there to land, and put the same on shore. The term plantation, in its common known signification, is applicable only to colonies abroad, where things are grown, or which were settled for the purpose principally of raising produce; and has never, in fact, been applied to a place like Gibraltar, which is a mere fortress and garrison, incapable of raising produce; but supplied with it from other places. In truth, the term plantation, in the sense used by the navigation laws, has never been applied either in common understanding or in any acts of parliament, (at least none such could be pointed out when demanded in the course of the argument,) to any of the British dominions in Europe; not to Dunkirk, while that was in our possession, nor at the present day to Jersey, Guernsey, or any of the islands in the channel. And the continued exclusion of all these from the direct import trade of the colonies affords a strong practical exposition of the law."

It may now, indeed, be said that there does not exist a single colony or plantation which is not either expressly acknowledged to be such, either by act of parliament, or some specific treaty. The only case which could arise might be, whether the cutting wood, taking in water and provisions, drying nets, &c. and other acts of temporary use or property, in islands or places not possessed by acknowledged powers, (Otaheite, and some of the Friendly Islands,) would constitute any legal notion of a colony or plantation. Certainly not; the words in the Navigation Act, dominion and possession, are to be construed as intending an actual occupation and appropriation by the crown and country; an addition to the common territory, and a communication of its protection and laws. In the same manner, no settlement by missionaries would constitute a plantation; there must be an actual occupation by the crown and sovereign power.

The breach of the navigation laws is accompanied by a forfeiture of the ship and cargo. The proceedings may be

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either summarily by the officers of the crown, by information in the Court of Exchequer, or by action in the courts of common law. The words of the stat. 12 Car. II. are, " that the goods and commodities shall be forfeited; as also the ship or vessel, with all its guns, furniture, &c. One-third part to his Majesty, &c.; one-third part to the governor of such land, plantation, island, or territory, where such default shall be committed, in case the said ship or goods be there seized; or, otherwise, *that* third part *also* to his Majesty, &c. and the other third part to him or them who shall seize, inform, or sue for the same, in any court of record, by bill, information, plaint, or other action, &c. And all admirals, commanders, &c. are required to bring in, as prize, all such ships or vessels as shall have offended contrary thereunto, and deliver them to the Court of Admiralty, there to be proceeded against; and, in case of condemnation, one moiety of such forfeitures shall be to the use of such admirals or commanders, and their companies, to be divided and proportioned amongst them, according to the rules and orders of the sea in case of ships taken as prize; and the other moiety to the use of his Majesty."

Upon such breaches of the navigation laws, the court of common law and Admiralty have, therefore, in certain cases, a concurrent jurisdiction.

In a very early case, under the 12 Car. II. c. 18., it was adjudged that the subject might bring detinue for goods, the importation of which was prohibited by the above act, as the lord might bring replevin for the goods of his villein distrained; for the bringing of the action vests a property in the plaintiff. (*m*) As against the ship the proceeding is in *rem;* and it has been de-

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(*m*) Roberts *v.* Wetherall, 1 Salk. 223. 12 Mod. 92. 5 Mod. 195. Comber 361. S. C.

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cided that, by the seizure of a forfeited ship, the property of the owner is devested; and he cannot maintain trespass against the party making the seizure, although the latter do not proceed to the condemnation of the ship. (*n*)

(*n*) Wilkins *v.* Despard, 5 T. R. 112.

CHAPTER III.

TRADE WITH ASIA, AFRICA, AND AMERICA, NOT BEING COLONIAL.—TRADING COMPANIES—THE EAST INDIA COMPANY, SOUTH SEA, HUDSON'S BAY, AFRICAN COMPANIES, SIERRA LEONE COMPANY, SLAVE TRADE, LAWS AND TREATIES TO EFFECT ITS ABOLITION, &c.—RULES AND REGULATIONS.

IT has already been observed, that our shipping and navigation, as respected the navigation laws, naturally divided itself into five heads: the colonial trade; the trade beyond Europe not being colonial; the European trade; the fisheries, and coasting trade; and the regulations for ascertaining the ownership and built of British ships by registers and certificates of registry.

The purpose of our work is to examine the subject before us according to this method.—In the former chapter, the law of our colonial trade, under the navigation act of Charles II., and the subsequent changes down to the present time, have been fully stated. In the present chapter we propose to treat of the trade with Asia, Africa, and America, not being colonial, during the same period.

In the colonial trade our legislature proposed to itself the two main objects; the exclusive possession of the market of its colonies, and the exclusive carriage and transport of their produce and supply in British shipping. In the trade with Asia, Africa, and America, not being colonial, the simple object was the encouragement of British shipping, and the abridgment or suppression of the Dutch carrying trade; and, that our navigation interests might have the full advantage of the large share of our merchants in

Trade with Asia, Africa, and America, not being colonial.

this trade, the first attention of the legislature was directed to the two important provisions; first, that this branch of our trade should be carried on in English ships; and, secondly, that such voyages and such trade should be directly with those countries. Thus, by the third section of the 12 Car. II., no goods or commodities of the growth or manufacture of Asia, Africa, or America, shall be imported into England, Ireland, &c. in any other ship or vessel, but in such as do truly and without fraud belong to the people of England, Ireland, &c., or of the lands, islands, or territories, in Asia, Africa, or America, to his Majesty belonging, and whereof the master, and three-fourths, at least, of the mariners, are English. And in the next following section it is enacted, that such trade shall be direct; that is to say, that all goods of foreign growth or manufacture, to be so brought to England in English shipping, shall be shipped only from the country of the said growth and manufacture, or from those ports where the said goods and commodities can only be, or are, or usually have been, first shipped for transportation. The 12th, 13th, and 14th sections make an exception in favour of the Levant trade, the East India Company, and the trade with Spain, Portugal, the Azores, and the Canaries, in all of which branches, from the necessity of the case, the navigation act of Charles II. permits the importation, in British shipping, of such foreign produce from other ports and places than those of their growth or manufacture. It is scarcely necessary to add, that the immediate object of this provision, like that indeed of the whole system in its origin, was to preclude Amsterdam, and the ports of Holland and the Netherlands, from being the emporium of this trade, and to give our own marine the advantage of fetching for ourselves what the native merchants of foreign countries could not bring in their own ships. This principle has been found so beneficial to the naval, if not to the mercantile interest of the country (but perhaps to both,) that it has since been retained, under all circumstances, except when some peculiar properties of the trade or commodity have required a departure from the rule.

Trade with Asia, Africa, and America, not being colonial.

Upon this principle of necessity, the 2 Will. and Mary, s. 1. c. 9. excepts thrown silk; and the stat. 7 Ann. c. 8. adds the exception of Jesuit's bark, sarsaparilla, balsam of Peru, and other drugs, the growth and product of America. In the same manner, stat. 6 Geo. I. c. 14. repealed the proviso in the 12th section of the act of navigation as to the importation of raw silk and mohair yarn; and enacted that such raw silk and mohair of Asia should be brought only from the Turkish dominions, and no longer from Italy. It was deemed necessary likewise to encourage the importation of cochineal and indigo; and for this purpose were passed the stat. 13 Geo. I. c. 15., and stat. 7 Geo. II. c. 18., by which those commodities were allowed for a certain time to be imported from any port or place, duty free, in British or other ships in amity with this country. These temporary acts have been further continued by 46 Geo. III. c. 29., and 57 Geo. III. c. 23.

The same changes in the channels of trade have made necessary other relaxations in this useful rule of our navigation act. Thus as Russia had become the commercial road from Persia, the 14 Geo. II. c. 36. permits any member of the Russian company to import into this kingdom, in British built shipping, any such Persian produce from a Russian port. This act, however, prohibited the wearing of such Persian silks and commodities in England, to the injury of our domestic manufactures; and saves to the East India Company their powers and privileges derived from their charter. The 23 Geo. II. c. 34. further directs how this trade is to be carried on, viz. in British *built* shipping, owned and navigated according to law.

The scarcity and consequent high price of articles necessary for our manufacturing process have also been the cause of frequent relaxations. Thus permission was given by stat. 25 Geo. II. c. 32. to all his Majesty's subjects to import into this kingdom *gum senega*, in British built ships,

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navigated according to law, from any port or place in Europe. Upon the same principle, when the East India Company could not supply the demand of the African Company for East India coarse calicoes, &c. stat. 5 Geo. III. c. 30. gave permission to import those articles, in British ships, from any port in Europe not within his Majesty's dominions, in such quantities as should be deemed necessary for the African trade.

The materials of our manufactures are naturally the subject of peculiar favour, and the rule (of allowing nothing but a direct trade, and no intervening carrier or market,) has been frequently departed from, when required to procure an abundant and cheap supply of the means of our industry. Thus by 6 Geo. III. c. 52. s. 20., any sort of cotton wool may be imported in British built ships from any country or place duty free; (*a*) and the same permission is extended to goat skins dressed and undressed by the 2 stat. 15 Geo. III. c. 35. s. 1., and 31 Geo. III. c. 35. (*b*)

The institution of the great chartered companies, the East India Company, and others, falls under this division of our subject, as the acts by which they were created gave them an exclusive right to trade with certain parts of Asia, Africa, and America. It is necessary, therefore, to consider them in the present chapter.

The first of the exclusive companies in commercial and political importance is the East India Company. It is not our object in this place to give more than a brief outline of its history; our principal design is to shew the nature, extent, and term, of its monopoly. By a course of things which could not have been foreseen at the time of the company's first institution, it has become one of the most extra-

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(*a*) A small duty is now charged.

(*b*) They are now subject to a small duty. It is provided by the 15th sect. of 12 Car II. c. 18. that nothing in that act shall extend to bullion, or goods taken by way of reprisal by English commissioned ships.

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ordinary corporate bodies in Europe; having gradually ascended from the character of a mere mercantile factory, to that of a sovereign administrator of one of the most extensive and populous empires in the world. Having conquered the neighbouring powers, in a great part, by its own resources, and almost entirely at its own expense, the company has acquired many of the territories, and the property of the revenues of the native princes; and thus, in addition to its mercantile character, it unites that of an empire in an empire, and effectually compels the mother country to acknowledge it in its double character, that of a commercial factory, and, as it were, a dependent and tributary government, responsible to the sovereign and state, as far as respects control, but having a property, as it were, and dominion, in the territories under its charter.

Queen Elizabeth, by charter in 1600, established the first incorporated company for this trade. They afterwards acquired the name of the East India Company, or "*united Company of merchants of England trading to the East Indies.*" By the 9 and 10 Will. III. c. 4. their rights are more explicitly defined, and the limits of their monopoly adjusted. By section 61 they are empowered freely to traffic, and use the trade of merchandise, in such places, and by such ways and passages, as are already frequented, found out, and discovered, or which shall hereafter be found out or discovered, and as they shall esteem and take to be fittest and best for them, "into and from the East Indies, in the countries and parts of Asia and Africa, and into and from the islands, ports, havens, cities, creeks, towns, and places, of Asia, Africa, and America, or any of them, beyond the Cape of *Bona Esperanza* (Good Hope) to the Straights of Magellan, where any trade or traffic of merchandise is, or may be used or had; and to and from every of them." By section 81 this trade is confined solely to the East India Company; and others trading in violation of their exclusive rights are to incur the forfeiture of their vessels and goods. This act reserved a power for deter-

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mining their charter after September 1711, on giving due notice, and on payment of the loan which the public owed the company. The old East India Company, established by Queen Elizabeth, and the new company incorporated by the statute of Will. III., afterwards formed an union, which was confirmed by 6 Ann. c. 17. In 1708 the company obtained an extension of their term in the exclusive trade for fifteen years: this was a purchase, and the consideration was a loan to the government. By the stat. of 10 Ann. c. 27., all the provisoes and powers of former acts of parliament for determining their trade and corporation were repealed; and a power was reserved to the public to redeem the debt due to the company at any time after September, 1733. The stat. of 3 Geo. II. c. 14. continued to them their exclusive trade till 1766, for which they gave to the public a premium of 200,000*l.* By 17 Geo. II. c. 17. they obtained a further term of fourteen years, for which they made a loan to the government of one million at three per cent. The next stat. is the 21 Geo. III. c. 65.; it is intituled an act "for establishing an agreement with the united company of merchants of England trading to the East Indies, for the payment of the sum of 400,000*l.* for the use of the public, in full discharge and satisfaction of all claims and demands of the public, from the time the bond debt of the East India Company was reduced to 1,500,000*l.*, until the 1st of March 1781, in respect of the territorial acquisitions and revenues lately obtained in the East Indies; and also for securing to the public, in respect thereof, for a term therein mentioned, a certain part or proportion of the clear revenues and profits of the said company, and for granting to the said company, for a further term, the sole and exclusive trade to and from the East Indies." By s. 33. in this act, it is provided, that all vessels belonging to the company, whether built or purchased by them, shall be deemed British ships within the meaning of the Navigation Act. The term granted by this act was determinable in 1794. The 24 Geo. II. c. 25., and 33 Geo. III. c. 52. are the next in order. By these

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acts, which effected an important change in the constitution of the company, and brought it immediately under the supervision and controul of parliament, the territorial acquisitions, with their revenues, are continued in the company; but his Majesty is empowered to appoint commissioners for the affairs of India, who are invested with authority to superintend, direct, and control all acts, operations, and concerns, which relate to the civil and military government of India. The several functions of the board of control are then declared and marked out. The government of presidencies is vested in the governor-general and the council of the presidency; and all vacancies in the office of the governors or council are to be filled up by the directors. The powers of these officers in their several departments are defined; and an authority is reserved to the court of directors to suspend the powers of the governor-general, with the approbation of the board of commissioners. An exclusive trade is then vested in the company, according to the limits mentioned in the act of 9 and 10 Will. III., with the proviso, "that at any time, upon three years' notice to be given by parliament, after the 1st of March, 1811, upon the expiration of the said three years, and upon payment made to the said company of any sum or sums, which, under the provisions of any acts of this present session of parliament, shall, or may, upon the expiration of the said three years, become payable to the said company by the public, according to the true intent and meaning of such act, then and from thenceforth, and not before or sooner, the said right, title, and interest, of the said company, to the whole, sole, and exclusive trade to the East Indies, and parts aforesaid, shall cease and determine." It is provided, however, by this act, (33 Geo. III. c. 52.) that the sailing of ships upon the southern whale fishery, under the provisions of 26 Geo. III. c. 50., and 28 Geo. III. c. 20., into the Pacific ocean, by Cape Horn, shall not be deemed an infraction of the privileges of the company. This act further provides that, during the ex-

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(a) See 33 Geo. III. c. 52.

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clusive trade of the company, it shall be lawful for British subjects, resident in the king's dominion, to export, on board the ships of the company, goods, wares, and merchandise, of the growth, produce, and manufacture, of these dominions, to any of the ports and places in the East Indies, usually visited by their ships; and that, in like manner, it shall be lawful for any of his Majesty's subjects in the civil service in India, to consign on board the ships of the Company, or in vessels freighted by them, bound to Great Britain, such goods, wares, and merchandise, as may be lawfully imported. (s. 81.) None but the company, or persons acting under their licence, are to be suffered to export or import military stores, pitch, tar, or copper, or to import into Great Britain India calicoes, dimities, muslins, or piece goods, &c. (s. 82.)

It is further provided that, in case the company shall not purchase every year 1500 tons of British copper, for the purpose of exportation to some place within the limits of their charter, the proprietors or holders of British copper, resident in this country, may export that quantity, in ships to be provided by the company, to any port or place they think proper in the East Indies. The act further regulates the manner of its exportation, and the charge of freight, &c. (s. 24.) And, provided a sufficient quantity of calicoes, &c. are not imported by the company for the consumption of the British market, the board of controul are authorised to license individuals to import such goods in the company's ships, under such limitations and restrictions as the board shall think necessary. (s. 85.) The act then proceeds to several regulations for the benefit of individuals engaged in the private trade; and provides means for the secure remitting of the property of private persons from India to Great Britain.

In order to prevent unlawful trading, it is then enacted that, if any of his Majesty's subjects of Great Britain, &c. or of the colonies, islands, or plantations in America, or the

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West Indies, other than such as by the said united company shall be licensed, or otherwise thereunto lawfully authorised, shall, at any time or times, before such determination of the company's whole and sole trade, as is hereinbefore limited, directly or indirectly, sail to, visit, haunt, frequent, trade, traffic, and adventure to, in, or from the said East Indies, or other parts hereinbefore mentioned, contrary to the limitations, &c. of this act, they shall incur the forfeiture of ship or vessel, &c. and also all the goods and merchandize laden thereupon, and all the proceeds and effects of such goods and merchandize, and double the value thereof; one-fourth part of such forfeiture to the person who shall seize and inform, and sue for the same; the other three-fourth parts to the use of the united company, they defraying the charge of the prosecution. (s. 129.) Persons going to India, without the licence of the company, are to be deemed unlawful traders, and may be arrested and sent back to England.

Upon these statutes, the 24 Geo. III., and 33 Geo. III., the rights of the company subsisted until the 53 Geo. III. c. 155., which is the next and most important act. This act has partially repealed the monopoly of the company, and thrown open to the British merchant the trade of the East. This act continues under the government of the company, for a further term, the territorial acquisitions in India, with the late acquisitions on the continent of Asia, and in the islands north of the Equator: it confirms to them the sole and exclusive trading with China, and the *sole* and exclusive right of trading and trafficking in TEA, "in, to, and from, all islands, ports, havens, coasts, cities, towns, and places, between the Cape of Good Hope and the Streights of Magellan." But this, as well as all other exclusive trade, is to cease on the expiration of three years' notice by parliament, any time after the 10th of April 1831, and upon the discharge of the public debt owing to the company. (s. 2) There is, however, the same saving clause as in the statute of 9 and 10 Will. III., and

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53 Geo. III., by which, after such determination of their charter, the company is still to continue incorporated, and to enjoy the right of trading in common with others. It then provides that, after April 1814, any of his Majesty's subjects may trade to and from the United Kingdom; and from and to ports and places in the company's present limits, except China, in ships navigated according to law. But the company are alone permitted to export military stores to certain places.

All ships engaged in the private trade are to clear out from some port in the United Kingdom; and all goods imported in private vessels are to be brought to some port in the United Kingdom, which shall have been declared fit and proper for the deposit of their goods and merchandise by order of council. (*c*) Such ships are not to go within certain limits in India, without licence from the directors; nor to any places except to some one of the principal settlements, *viz.* Fort William, Fort St. George, Bombay, and Prince of Wales's Island, without a special licence. The directors are, however, required to give licence to the private vessels to enter the principal settlements in India; but special licences are required for the continent of Asia, between the Indus and the town of Malacca, or the islands north of the Equator, or Bencoolen. These are left to the discretion of the directors, subject to the controul of the board of commissioners, who, if they think fit to direct the company to issue any licences for this trade, which the court of directors have declined to issue without such direction, are to record their reasons, and the special circumstances of the case. By the 13th section it is provided, that no ship under three hundred and fifty tons shall clear out, or be permitted to trade, within the limits of the com-

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(*c*) By orders of council of the following dates, the ports under-mentioned have been declared fit and proper for such trade Liverpool, *Dec.* 1814; Hull, *Feb.* 1815; Greenock and Port Glasgow, *March* 1815; Bristol, *August* 1817.

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pany's charter. The 20th section reserves a power to the legislature, during the farther term granted to the company, for authorizing private trade, as well between places without as within the company's limits, as between the United Kingdom and those limits, except China. In order to encourage the fishery carried on to the southward of the Greenland seas and Davis's Streights, it is provided that ships engaged in the southern whale fishery may sail between the Cape of Good Hope and the Streights of Magellan: but no vessel is to pass farther to the northward than eleven degrees of south latitude, without a licence from the board of the controul; and no ship, under three hundred and fifty tons, is to sail without a licence. (s. 32.)

These are the principal provisions relating to commercial purposes in this act; such as are purely political or œconomical are not within the present subject of inquiry.

In order that the forms of the registry acts may be observed in the East Indies, the 55 Geo. III. c. 116. impowers a collector of duties, or senior merchant, of six years' standing, in ports in which there is no collector or comptroller of customs, to register, and grant certificates of the registry, of all vessels built in the territories under the government of the East India company; and all such vessels, when so registered, are to be deemed British *built*. But no vessel, registered under the authority of the act, is entitled to the privileges of a British *built* ship, in any voyages or trade beyond the limits of the company's charter; except such as are specified in the 53 Geo. III. c. 155., and 54 Geo. III. c. 34. (*d*)

It is further provided, that no Asiatic sailors, Lascars, &c. shall be deemed to be British sailors, seamen, or mariners, within the intent and meaning of the act of the

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(*d*) This exception applies to ships engaged in the southern whale fishery.

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34 Geo. III. But, in case British seamen cannot be procured in the East Indies, the governor of any colony, island, or territory, may license a vessel to sail with a less proportion of British seamen than is required by law: but such vessel, upon her voyage back from the United Kingdom, must have the full and proper proportion of seven British seamen to every hundred tons; but vessels trading within the limits of the company's charter, including the Cape of Good Hope, may be manned and navigated wholly, or in any proportion, with Asiatic sailors, or Lascars.

It has been generally understood that certain provisions of the navigation acts did not apply to the East Indies: some doubts however existing, the 57 Geo. III. c. 95. was passed, which declares, that nothing contained in the navigation acts, or in any other act, passed for the like purposes, shall extend to, or in any way affect, the importation or exportation of any goods by the East India company, or by any other of his Majesty's subjects, in British registered vessels, navigated according to law; or in vessels registered and trading under the provisions of 55 Geo. III. c. 116. It is likewise made lawful to import into any island or territory, within the limits of the company's charter, not being under their government, in the vessels of any state, not being an European state, in amity with England, and lying within the said limits, any articles of the growth, produce, and manufacture of any such state; and to export from thence, in any such vessel, goods which have been legally imported.

Such are the commercial privileges of the East India company, which, since the opening of their trade by the 53 Geo. III., has assumed a different character.

Their temporary rights are—1. The exclusive trade to China, in tea; with such authority of regulations as respect the free trade to India as are given them by the late act.—2. The administration of the government and revenues of their territories in India, subject however to the controul of commissioners, appointed by the executive authority at home. Their rights in perpetuity are, to be a body politic and corporate, with perpetual succession, and a joint stock for *ever;* notwithstanding their exclusive trading may be determined by parliament.

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Although their commercial privileges and power of administering the resources and government of India should be determined by the legislature, they would, nevertheless, still remain an incorporated company in perpetuity, with the exclusive property of Calcutta, Fort William, Madras, and Fort St. George, Bombay, Bencoolen, and other smaller settlements in India, as factories acquired or purchased by their own resources. The legislature, therefore, acting upon just principles, will be competent only to deprive them of all exclusive trade; and to take into its own hands, or into those of the crown, the government and collection of the revenue in India.

It is not within the limits of a work of this nature to enter into the political reasons for the several statutes of which it treats, any further than as the intention of the legislature explains the construction of its acts. It is sufficient, therefore, to observe of the board of controul, first established by 24 Geo. III. c. 25., that its main purpose was to maintain the sovereignty of the crown and parliament over a territory which had gradually enlarged itself from a factory into an Empire. The board of controul, therefore, may be said to possess these three principal functions:—1. That of connecting India with the government at home as an integral part of the general empire.—2. That of superintending the conduct of the company's servants, and repressing those wars of ambition, aggrandisement, or private gain, the frequent occurrence of which first attracted the attention of the legislature.—3. That of bringing home, and prosecuting in the English courts of law, such crimes and offences as affected the honour of the crown, and the interests of general equity and humanity.

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What the 24 Geo. III. had left incomplete, the 33 Geo. III. c. 52. supplied: it enlarged and regulated the controul in Great Britain; it added new provisions with respect to patronage and promotion; it confirmed the general trade, but added special limitations; it defined the illicit and clandestine trade, and regulated some appropriations of the company's revenue; it established a method of suing for forfeitures and penalties and proceedings as to seizures; it enacted some regulations for the administration of general justice in India, and made some new provisions as to the directors of the company's, and their concerns in England. By 35 Geo. III., (continued by the 42 Geo. III. c. 20., during the continuance of the company's exclusive right of trade under the 33 Geo. III. c. 52.) the importation of goods from India and China, and other parts within the limits of the company's trade, is allowed in ships, not of British *built*, or registered as such, having been taken up and employed in the East Indies on account of the company; and the same ships are allowed to export goods to the East Indies as British built ships. (*e*)

As the public duties of the officers of the government and revenue in India might be impaired by their private interests, if allowed to engage in traffic, all governors and counsellors, collectors, supervisors, and others, employed in the revenue, are prohibited from trade, except for the company. The judges of the supreme court of judicature in Bengal are prohibited altogether from trade.

South Sea Company.

The South Sea Company was constituted and erected into a corporation by the 9 Ann. c. 21. By this statute they were to have the sole trade to all places of America; on the east side, from the river Oronoco, to the southernmost part of Terra del Fuego; on the west side, from the

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(*e*) See *ante* as to registering ships built in India, 55 Geo. III. c. 116. Nothing in the navigation acts extends to the exportation or importation of the East India Company, 57 Geo. III. c. 95.

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southernmost part of Terra del Fuego, through the South Seas, to the northernmost part of America; as likewise to all places within the same limits, which were reputed to belong to Spain, or which should thereafter be discovered within those limits, not exceeding three hundred leagues from the continent of America, between the southernmost part of Terra del Fuego, and the northernmost part of America on the west side; except the kingdom of Brazil, such other places on the east side of America as were then actually in possession of the crown of Portugal, and the country of Surinam. Provided, however, that the company should not sail beyond the southernmost part of Terra del Fuego, except only through the Streights of Magellan, or round Terra del Fuego; nor should go from thence to the East Indies, nor return to Europe, except by the same course, through the Streights of Magellan, or Terra del Fuego; nor should trade, &c. in any goods or produce of the East Indies, Persia, China, or any other places within the limits of the East India Company; nor should send any ship, within the South Seas, from Terra del Fuego to the northernmost part of America, above three hundred leagues to the westward of, and distant from, Chili, Peru, Mexico, California, or any other shores of North or South America, contained between Terra del Fuego and the northernmost part of America.

The monopoly of this company continued a century without much inconvenience to the general commerce of the country; but, during a period of the late war, when the intercourse with South America was unexpectedly thrown open to Europe, the exclusive privileges which the company claimed occasioned a serious impediment to the trade of the general merchant. The South Sea Company had become, in fact, little more than a title, without any thing deserving the name of capital, and with no active use of the extensive privileges and rights which it claimed: it seemed absurd, therefore, to continue an obstacle of this kind to the increasing trade of Great Britain; and to re-

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spect the charter of a company which had abandoned all the purposes and conditions upon which it had been granted.

On account, indeed, of certain frauds and abuses (*f*) which had been practised relating to the capital stock, or pretended capital stock of this company, their property had been taken out of their hands, and vested in trustees for the satisfaction of their creditors; but their corporate character still existed, 7 Geo. I. c. 28. A considerable trade was, notwithstanding, carried on within the limits of their charter, and no very serious obstacle was opposed by the company to this infringement of their rights. Their charter and their privileges were considered nearly as obsolete; but when the question was raised as to the lawfulness of this traffic, the courts of law had no difficulty in deciding, (the question being discussed upon an action on a policy of insurance,) that a vessel could not trade within the limits of their charter unless expressly licensed by them. (*g*) At length the 47 Geo. III. c. 23. repealed so much of the act of 9 Anne, as vested in the South Sea Company the exclusive trade, as far as respected places, which at the time of passing the act were, or thereafter might be, under the British dominion. For the encouragement of the southern whale fishery, the 42 Geo. III. c. 77. had already repealed the necessity of a licence from the South Sea or the East India Company, for ships passing through the Streights of Magellan, or round Cape Horn, and trading in the Pacific Ocean. And several acts of parliament had also passed for the benefit of the fisheries, which had gradually broken in upon and restricted the exclusive rights of this company.—At length the 55 Geo. III. c. 57. altogether abolished its commercial privileges. By this last act the sole and exclusive privileges of trade and traffic, vested in the company by the 9 Anne, are declared to be *absolutely* repealed; "and shall be deemed and taken

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(*f*) *South Sea bubble.* (*g*) Toulmin *v.* Anderson, 1 Taunt. 232.

South Sea Company.

to have ceased and determined from and after the 12th of May 1815, to all intents, constructions, and purposes whatsoever." In consideration of the surrender of such exclusive privileges, a guarantee fund was established in the public stocks; and it was provided by the above-cited statute that when such fund should amount to the capital stock of £610,464. 3*s.* bearing an interest of 3 per cent. *per annum*, the same should be transferred to the South Sea Company, as a full satisfaction for the surrender of their monopoly.

Hudson's Bay Company.

In 1670 a charter of Charles II. granted an exclusive trade to another part of America, to the governors and company of adventurers of England trading into Hudson's Bay. They were to have the sole trade and commerce of and to all the seas, bays, streights, creeks, lakes, rivers, and sounds, in whatsoever latitude, that lie within the entrance of the streights commonly called Hudson's Streights, together with all the lands, countries, and territories, upon the coasts of such seas, bays, and streights, which were then possessed by any English subjects, or the subjects of any other Christian state, together with the fishing for all sorts of fish, of whales, sturgeon, and all other royal fish, together with the royalty of the sea. But this extensive charter has not received any parliamentary confirmation or sanction.

African Company.

By a royal charter, made in the 24th year of the reign of Charles II., a great portion of Africa was granted to certain persons by the name of the Royal African Company. This Company, since their establishment, had been put to great expence in rebuilding and enlarging several of their forts and castles on the coast, and otherwise maintaining their settlements. By the 23 Geo. II. c. 31., which was an act for improving and extending the trade to Africa, a new company was established, by the name of the *Company of merchants trading* to Africa. The first section of this act grants a free trade to Africa to all his Majesty's

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subjects between the port of Sallee, in South Barbary, and the Cape of Good Hope. The forts, settlements, and factories, of the original Company were vested in the new Company by this statute: but they were prohibited to trade in their joint capacity; and their affairs were directed to be placed under the management of a committee, chosen annually, who were precluded from making any orders and regulations in restraint of a free trade with Africa. By 25 Geo. II. c. 40. the Royal African Company was abolished, and all their forts and factories on the coast were vested in the Company of Merchants trading to Africa.

Sierra Leone Company.

The Sierra Leone Company was incorporated by the 31 Geo. III. c. 55. The object of their incorporation was not only with a view of establishing a general trade and commerce with Africa, but for exploring the interior of that continent; and to assist them in this purpose, his Majesty was empowered by act of parliament to make them a grant of the peninsula of Sierra Leone. After an experiment of sixteen years, the Company found it expedient to relinquish the government and management of this colony, and expressed a desire to surrender to the crown the settlement which had been granted them by letters patent; and supplicated that their charter of incorporation might cease and determine. Accordingly, the 47 Geo. III. s. 2. c. 44. was passed, by which the letters patent were declared void, and the peninsula of Sierra Leone was revested absolutely in his Majesty. The Sierra Leone Company, therefore, has now altogether ceased.

South America.

The trade with Spanish South America and Great Britain, except such as is carried on with the insurgent provinces at the private hazard of adventurers who can elude the vigilance of the *guardas de costas*, still remains under the exclusive monopoly of Spain; but by the late treaty with that country it is provided, by the fourth article, that in the event of the commerce of the Spanish American possessions being opened to foreign nations, his Catholic Ma-

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jesty undertakes that Great Britain shall be admitted to trade with those possessions upon the footing of the most favoured nations. In favour of the Portuguese dominions in South America, the rule in the third section of the 12 Car. II. c. 18. has been relaxed. Thus by 48 Geo. III. c. 11. it is enacted, that it shall be lawful to import into Great Britain directly from Brazil, or any of the territories or possessions of the crown of Portugal on the continent of South America, in ships or vessels built in the kingdom of Portugal before the first day of January 1808, or in ships or vessels built in any of the aforesaid territories, or possessions on the continent of South America, or in vessels of war, or in ships condemned as prize, &c. and owned by subjects of the Portuguese government resident in the before-mentioned territories, and whereof the master and three-fourths of the mariners, at least, are subjects of the Portuguese government, and resident in the said territories, &c. any goods, wares, and merchandise, the produce or manufacture of the said territories, not prohibited by law to be imported from foreign countries. (*h*)

United States.

We have already explained the condition of British commerce with the United States of America. It was necessarily so implicated with our colonial trade, that we preferred to review it under that head for the convenience of our arrangement. (*i*) Though our own courts of law are not bound to notice any acts of a foreign legislature, yet, as the practice of our navigation is necessarily affected by such laws of foreign countries, it is incumbent upon us briefly to observe, that the American Congress, in the year 1817, enacted a system of laws corresponding in a great degree with our

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(*h*) Spanish treaty, signed at Madrid, July 5th, 1814. For the trade between South America and the colonies of Great Britain in the West Indies and North America, see Colonial trade, chap. 2. *passim*; see likewise, as to this trade, 31 Geo. III. c. 38., 53 Geo. III. c. 50. s. 13., 56 Geo. III. c. 91., and 58 Geo. III. c. 27.

(*i*) See ante, page 44.

United States. own navigation laws, and more particularly, as respects two important principles, of not allowing a carrying trade, and of confining to themselves the coasting trade of their own shores. It is not within the purpose of this work to enter more fully into these foreign laws; but it will not be without use to add the following Rules, or Laws, thus recently enacted by the United States.

RULE I.

Navigation laws of the United States.

No goods shall be imported into the United States from any foreign place, except in vessels of the United States, or in such foreign vessels as truly and wholly belong to the citizens and subjects of that country of which the goods are the growth, production, or manufacture, or from which goods can only be, or most usually are, first shipped for transportation; provided, nevertheless, that this regulation shall not extend to vessels of any foreign nation which has not adopted, and which shall not adopt, a similar regulation.

RULE II.

No goods shall be imported, under penalty of the forfeiture thereof, from one port of the United States to another port of the United States, in a vessel belonging wholly, or in part, to a subject of any foreign power: but this clause shall not be construed to prohibit the sailing of any foreign vessel from *one* to *another* port of the United States; provided no goods (other than those imported in such vessel from some foreign port, and which shall not have been unladen,) shall be carried from one place to another in the United States.

RULE III.

Navigation laws of the United States.

(*k*) From and after the 30th of September, 1818, the ports of the United States shall be, and remain closed, against every vessel owned wholly, or in part, by a subject or subjects of his Britannic Majesty, coming or arriving from any place in a colony or territory of his Britannic Majesty, which is, or shall be, by the ordinary laws of navigation and trade, closed against vessels owned by citizens of the United States: and such vessel that, in the course of her voyage, shall have touched at, or cleared out from, any place in a colony or territory of Great Britain, which shall, or may be, by the ordinary laws of navigation and trade aforesaid, open to vessels owned by citizens of the United States, shall nevertheless be deemed to have come from the place in the colony or territory of Great Britain closed as aforesaid, against vessels owned by citizens of the United States, from which such vessel cleared out and sailed before touching at and clearing out from an intermediate and open place as aforesaid; and every such vessel, so excluded from the ports of the United States, that shall enter, or attempt to enter the same, in violation of this act, shall, with her tackle, &c. together with her cargo, be forfeited to the United States.

RULE IV.

From the 30th of September, 1818, the owner, consignee, or agent, of every vessel, owned wholly, or in part, by a subject or subjects of his Britannic Majesty, which shall have been duly entered in any port of the United States, and on board of which shall have been there laden, for exportation, any articles of the growth, produce, or manufacture, of the United States, other than provisions and sea

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(*k*) The two last rules were established April 18, 1818.

Navigation laws of the United States.

stores necessary for the voyage, shall, before such vessel be cleared outward at the custom-house, give bond in double the value of such articles, with sureties, to the satisfaction of the collector, that the articles so laden on board such vessel for exportation shall be landed in some place *other than* a place in a colony or territory of his Britannic Majesty, which, by the ordinary laws of navigation and trade, is closed against vessels owned by citizens of the United States; and any such vessel, sailing without giving such bond as aforesaid, shall, with her tackle, &c. together with the article or articles laden on board the same, be forfeited to the United States. Provided, always, that nothing in this act contained shall be deemed and construed, so as to violate any of the provisions of the convention, to regulate commerce between the territories of the United States and of his Britannic Majesty:—signed, July 3, 1815.

The convention of commerce, above cited, does not affect this last rule; the only stipulation in that treaty under the head of the intercourse between the United States and the West Indies, &c. being, that each party should remain in the complete possession of its rights with respect to such an intercourse, as before that treaty. The rule, therefore, at the present date, (*l*) is in its full force.

Slave trade.

The next head under this chapter is one of the first importance, viz. the statutes abolishing the slave trade, and the treaties between the several European powers in furtherance of this great object of humanity. The first, and nearly the principal of these acts, is the 46 Geo. III. c. 52.; as this act, and those that follow it, hereafter to be mentioned, are very complicate, their enactments will be best represented in the form of rules. This method will afford us the opportunity of retaining, and briefly expressing, all the regulations, and omitting the more formal phraseology. After reciting an order in council dated the 15th of August

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(*l*) March 1819.

1805, as the groundwork of the act, the 46 Geo. III. c. 52. proceeds to the enactments condensed into the following rules:—

Slave trade.

RULE I.

No slaves, except in such special cases as are hereinafter excepted, shall be exported from any part of his Majesty's dominions, to any foreign island or colony whatever, under the penalty of the forfeiture of the ship and cargo; such ship and slaves to be seized, and the persons offending prosecuted, as hereafter mentioned.

RULE II.

No British subject whatever, nor any persons resident in his Majesty's dominion, shall export, or cause to be exported, or in any manner assist in exporting, any slaves from Africa, or *elsewhere*, (except from the British West India islands, in certain special cases, hereafter excepted,) to any foreign island or colony whatever; nor ship, nor tranship, *at* Africa, or elsewhere, any slaves, with such purpose of exporting them to such foreign island, or colony, under the penalty of the forfeiture of the ship and slaves, (so far as any British subject, or person resident in the British dominions, shall have any property or slave therein) such ship and slaves to be seized, and the persons offending to be prosecuted, as is hereafter mentioned.

RULE III.

Any of his Majesty's subjects, or persons resident in his dominions, importing, or transhipping, or causing to be imported or transhipped, any slave contrary to this act, shall forfeit for each slave 50*l.*; unless it can be proved that the prohibited act arose from inevitable accident, such

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proof to be on the accused party; or, unless such slave shall have been sentenced to transportation by a competent judicature in any British island. In such case the captain of the ship is to be provided with a certified copy of such judgment and sentence.

RULE IV.

All dealing and traffic in slaves in Africa is unlawful; as likewise all contracts relating to the removing or transporting such slaves from Africa or the British West India islands. And all British subjects, and residents within the British dominions, dealing by themselves or agents in such contracts for transferring of any slaves, or dealing with the *slave himself*, contrary to this act, shall forfeit 100*l.* for each slave, 47 Geo. III. c. 36., 51 Geo. III. c. 23.

RULE V.

No subject of his Majesty, or person resident within his dominions, shall remove, or assist in removing, as slaves, or for the purpose of being dealt with as slaves, any of the inhabitants of Africa, or of any place in the West Indies, or America, not within the dominions of his Majesty, either immediately, or by transhipment at sea, from Africa, or any such country or place, to any other country or place whatever. And no such subject or resident shall receive or confine on board any such inhabitant of Africa, &c. for the purpose of his being so removed under the penalty of the forfeiture of ship and slaves, and 100*l.* for each such inhabitant of Africa, &c. 47 Geo. III. c. 36.

RULE VI.

Slave trade.

All British subjects, or residents, &c. employing their vessels, capital, or credit, in trading in, or carrying slaves from Africa, or elsewhere, to any place under any foreign sovereign or state, shall forfeit double the value of all the money, ships, goods, &c., so by him or them employed, advanced, or secured. All mortgages, bond, or other securities, for the payment of any such unlawful services, or advances, shall be void; except in the cases of *bonâ fide* holders purchasing and receiving the same without knowledge of their having originated in unlawful purposes, 46 Geo. III. c. 52.

RULE VII.

Insurances of slaves, and ships engaged in such trade, to be void, and the insurers to forfeit 500*l.*, 46 Geo. III. c. 52., 51 Geo. III. c. 23.

RULE VIII.

No British ship, boats, or mariners, shall be employed in or at Africa, in supplying with slaves any foreign ship or factory, or person employed as their agent, under the penalty, if with the knowledge of the owner, of the forfeiture of such ship or boat, &c., to be seized and prosecuted as is hereafter mentioned, and the master to forfeit 300*l.* (same statutes.)

RULE IX.

No foreign ship, destined directly or indirectly to Africa, for the purpose of the slave trade, shall be fitted out in any

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British port; and if any person shall put goods on board for the purpose of being so employed in the slave trade, the ship, goods, &c. to be forfeited. And any British subject or resident, knowingly fitting out or manning such foreign ship, shall forfeit 100*l.*, 46 Geo. III. c. 52.

RULE X.

No British subject, or resident, &c. shall fit out, man, or navigate, or be concerned in the fitting out, &c., any vessel for the purpose of being employed in the slave trade, neither by himself or agents; penalty forfeiture of ship, &c. 47 Geo. III. c. 36.

RULE XI.

No person shall carry a slave from one British colony to another, without a licence from the governor or chief officer, and a bond in 50*l.* for every slave, for the true landing of such slaves in the place specified in such licence; and for producing within a limited time, according to the ordinary length of the voyage, a certificate from the chief officer of the customs of such place, that the said slaves have been so landed and left there. The bond shall be void, unless prosecuted within three years from the date. But this provision is not to extend to any slave employed in navigation or fishing, nor to domestic slaves attending their masters at sea on voyages to foreign parts: but such domestic slaves are not to exceed in number two for each passenger; and, where slaves are employed as sailors or fishermen, their names shall be indorsed upon the clearance or permit, 46 Geo. III. c. 52., 51 Geo. III. c. 23.

RULE XII.

Any inhabitant of Africa, or any territory not within the dominions of his Majesty, unlawfully carried away and im-

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ported into any of his Majesty's dominions, and there sold, or detained, as a slave, may be seized and prosecuted in the manner of contraband goods, 47 Geo. III. c. 36. All slaves so seized and taken shall be condemned to the sole use of his Majesty, for the purpose only of divesting and barring all other property and interest; but shall not be disposed of, or dealt with, as slaves, by or on the part of his Majesty. But such officers as may be empowered by the king in council to receive and provide for such slaves, may enter and enlist any of them into his Majesty's service, or bind them for any term not exceeding fourteen years, to such persons, and upon such conditions, as his Majesty shall direct by any order of council, 47 Geo. III. c. 36., 55 Geo. III. c. 172.

RULE XIII.

Where any slave, taken as prize, of or by any of his Majesty's ships or privateers, duly commissioned, shall be finally condemned, there shall be paid to the captors by the treasurer of the navy, in the like manner, as the bounty called *head money* is now paid, such bounty as his Majesty may direct by order in council, 47 Geo. III. c. 36., the captors to produce a certificate of the sentence of condemnation, and of the numbers taken and condemned; *idem:* any doubtful claims to this bounty to be decided by the admiralty courts.

RULE XIV.

Upon the condemnation of any slaves seized and prosecuted as forfeited, (by others than the commanders of his Majesty's ships of war,) a reward of 13*l.* for every man 10*l.* for every woman, and 3*l.* for every child under fourteen, shall be paid to the person prosecuting; and like sums to the governor of any colony in which such seizure shall have been made. But where such seizure shall have

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been made at sea by the officers of his Majesty's ships of war, a reward of 20*l.* for every man, 15*l.* for every woman, and 5*l.* for every child, shall be paid to such officer, so seizing and prosecuting to condemnation; the certificate of such seizure and prosecution to be granted by the officer appointed to receive and protect such slaves, and addressed to the lords of the treasury. The counterfeiting of such documents, or using the same, is felony without benefit of clergy; *idem.*

RULE XV.

Such seizures of ships and slaves, forfeited for any offence, against this act, (47 Geo. III.) may be made by any officer of the customs and excise, as well as by the commanders, &c. of his Majesty's ships of war. All offences against the act are to be tried as if committed within the body of the county of Middlesex. The parties, wherever the action is commenced, may plead the general issue, and give the acts and the special matter in evidence. And in the event of the plaintiff being nonsuited, or discontinuing his action, &c. the defendant shall recover treble costs. All penalties and forfeitures to be sued for within three years after the offence committed, 46 Geo. III. c. 52., 53 Geo. III. c. 112.

RULE XVI.

His Majesty in council may make regulations as to negroes who have been bound apprentices under 47 Geo. III. c. 36., so that they may not become chargeable to the island in which they have been so bound. But no act as to enlisting for any limited period of service, or granting any pensions after certain periods, shall extend to any negroes serving in any of his Majesty's forces; *idem.*

RULE XVII.

Slave trade.

All ships, whether British or foreign, duly condemned under any acts for the abolition of the slave trade, shall be entitled to be registered as British ships, in the same manner as if taken and condemned as prizes of war; 54 Geo. III. c. 59.

RULE XVIII.

When any slaves shall be captured or seized, the persons claiming any right in such slaves shall put them on shore, upon which the chief officer of the customs of the place shall make enquiry, whether such persons shall be willing and able to furnish food and necessaries for the said slaves during the proceedings and adjudication; and shall report to the governor the result of such enquiry. And where such persons shall not be able or willing to support the said slaves, the governor shall provide them with the due support during the proceedings, and the court shall direct the necessary charges to be defrayed by the persons receiving possession under the decree; 55 Geo. III. c. 172. Where the proceedings of the court shall extend to any length, and the persons claiming the property of the said slaves shall not be able or willing to supply the food and necessaries, a valuation shall be made of the slaves, and they shall be delivered over to the officer appointed by his Majesty to receive slaves condemned according to the 47 Geo. III. c. 36.; and such slaves shall be decreed to be restored; restitution, according to such valuation, shall be made by the treasurer of the navy; 55 Geo. III. c. 172. In the event of such restriction, the court, if it deem fit, may adjudge the captors, in addition to the restitution in value, to pay costs and damages, *idem.*

RULE XIX.

Slave trade.

All British subjects or residents carrying on the slave trade, or any way engaged therein, as principals, agents, or abettors, are declared to be FELONS, and shall be transported for a term not exceeding fourteen years, or kept to hard labour for a term not exceeding five years, nor less than three years. All petty officers, servants, or seamen, knowingly serving on board ships engaged in such traffic, and all persons knowingly underwriting, or procuring to be underwritten, any policies of insurance on such ships, are to be deemed guilty of a misdemeanour, and shall be punished by imprisonment, for a term not exceeding two years. But these provisions are not to extend to the prevention of the lawful removal of slaves from one British colony to another, nor to the removal of slaves from vessels in distress, nor to their transportation when convicted of crimes; 55 Geo. III. c. 23.

RULE XX.

All felonies or misdemeanours committed in Africa, or in any place other than the United Kingdom, or on the high seas, or in any place where the admiral has jurisdiction, shall be enquired of either according to the statute of 28 Hen. VIII., so far as the same act is now unrepealed, or according to 11 and 12 Will. III.—51 Geo. III. c. 23. But the penalties and forfeitures of former acts are not hereby repealed or altered. Any new enactments in 51 Geo. III. c. 23. to be regarded as accessional, *idem.*

RULE XXI.

The offences declared by 51 Geo. III. to be felonies or misdemeanours, committed on the high sea, &c. or where

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the admiral has jurisdiction, may be enquired of under any commission issued according to the direction of the 46 Geo. III. c. 54. And all persons convicted of any such offences, under any such commission, are made liable to the same penalties and forfeitures, as if they had been tried and convicted within this realm by virtue of any commission made according to the 28 Hen. VIII.—58 Geo. III. c. 98. (*m*)

(*m*) By 46 Geo. III. c. 54. all treasons, piracies, felonies, robberies, murders, conspiracies, and other offences, of what nature or kind soever, committed upon the sea, or in any haven, river, creek, or place, where the admiral or admirals have authority or jurisdiction, may be enquired of, determined, and adjudged according to the common course of the laws of this realm, used for offences committed upon the land within this realm, and not otherwise, in any of his Majesty's islands, plantations, colonies, dominions, forts, or factories, by virtue of the king's commission, under the great seal of Great Britain, to be directed to any such four or more discreet persons as the Lord Chancellor of Great Britain, Lord Keeper, or commissioners for the custody of the great seal of Great Britain, for the time being, shall from time to time think fit to appoint; and the said commissioners so to be appointed, or any three of them, shall have such and the like powers and authorities for the trial of all such murders, treasons, piracies, felonies, robberies, conspiracies, and other offences, within any such island, plantation, colony, dominion, fort, or factory, as any commissioners appointed, or to be appointed, according to the 28 Hen. VIII., by any law or laws now in force, have or would have for the trial of the said offences within this realm; and all persons convicted of any of the said offences, so to be tried by virtue of any commission to be made according to the directions of this act, shall be liable to, and shall suffer all such and the same pains, penalties, and forfeitures, as by any law now in force persons convicted of the same respectively would be liable to in case the same were respectively inquired of, determined, and adjudged within this realm, by virtue of any commission made according to the directions of the said statute of 28 Hen. VIII.

RULE XXII.

Slave trade.

Governors and commanders-in-chief, in Africa, within the limits of the settlements, forts, and factories, belonging to his Majesty, or the African Company, in Africa, may seize and prosecute all ships, slaves, natives of Africa, conveyed or dealt with as slaves, and all goods and assets forfeited for any offence against 46 Geo. III. c. 52., and 47 Geo. III. c. 36. Such governors and commanders, and all persons by them deputed, in the making of such seizures, are entitled to all the benefits and provisions of acts of parliament made for the protection of officers seizing and prosecuting, for any offence against any act relating to the trade and revenues of the British colonies or plantations in America ; 51 Geo. III. c. 23. And petty-officers, or seamen, on board ships engaged in the slave trade, giving information, within three months after the arrival of any such ship in port, that offenders removing and dealing in slaves may be apprehended, shall not be liable to any punishment, if such information be given within the same time from the arrival of the offending vessel at any port or place *out* of his Majesty's dominions, to his Majesty's ambassadors, envoys, consuls, &c., and such person, so giving information, shall not be liable to any punishment under the slave abolition acts. All ambassadors, consuls, &c. are required to receive such information, and to transmit the particulars to one of his Majesty's principal secretaries of state ; 51 Geo. III. c. 23.

RULE XXIII.

Certain importations of slaves into the British colonies on the continent of South America, having been made under a belief that they were authorized by law, are, by the 58 Geo. III. c. 49. declared valid, and prosecutions discharged.

RULE XXIV.

Slave trade.

Many estates in the Bahamas and in Dominica having become impoverished, so as not to afford food and employment to the slaves, his Majesty is empowered by his licence to allow the slaves therein to be transported thence to any of the British possessions on the continent of South America, upon proof that such transportation would not be to the disadvantage of the slaves, and upon a bond from their owner that such slaves should be removed in families; 58 Geo. III. c. 49. But no person whatever shall convey any slave from any British colony on the continent of South America to any other country whatever, except to some other British colony on the same continent, except under the circumstances before expressed in some of the rules above given; 58 Geo. III. c. 49.

Such are the existing laws of the slave trade, as respect this country *only*. But it belongs to the praise of the British government and people, that they have not only employed their own efforts to effect the abolition of this iniquitous traffic, but have exerted their powerful influence with every foreign state to co-operate with them in the same object of general humanity. Under the effect of this system, the British government has rendered, or is in the progress of rendering, the abolition of the slave trade a part of the public law of Europe. It will be seen in the following treaties, that some of the European sovereigns have wholly concurred with the British legislature in this benevolent purpose; having rendered slaves, and all ships engaged in the slave trade, a kind of contraband against the Law of Nations: and, under this character, authorized the armed ships of the respective countries to seize and confiscate them. Other powers, indeed, have not gone so far; but have recognized the justness of the same principle, both by an immediate diminution in the

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actual compass of their traffic; and by an express purpose, or rather contract, for its gradual, total, abolition. As the government of England, therefore, is empowered by these treaties to act even against foreign ships as respects the slave trade, and as these regulations have thus become a part of our own law, it is necessary to examine in detail the several treaties and their specific stipulations.

Treaty with Spain for preventing traffic in slaves, Sept. 1817.

By the first article, his Catholic Majesty engages that the slave trade shall be abolished throughout the entire dominions of Spain on May 13, 1820; and that, after that period, his subjects shall not carry on the slave trade on any part of the coast of Africa, in any manner whatever.

By the *second article* it is agreed, that the said Spanish slave trade shall *immediately*, (i. e. upon ratification of the treaty,) cease in every part of the coast of Africa, *north* of the Equator.

The *third* and *fourth articles* then stipulate for the sum of £400,000. to be paid by Great Britain, as a compensation to Spain for such abolition.

The *fifth article* declares all such slave traffic, (contrary to the treaty,) to be illicit and contraband trade, and authorizes all British and Spanish ships to seize any offending vessels or persons accordingly; Spanish vessels to be equally authorized to seize offending ships and persons belonging to Great Britain.

The *sixth article* is an engagement of the Court of Spain to act in conformity with the said treaty.

The *seventh article* stipulates, that every Spanish slave-ship, (so long as the trade continues lawful,) shall be provided with a royal passport, conformable with a model annexed to the treaty.

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The *eighth article* is a mere explanation of the seventh.

The *ninth article* stipulates, that every British or Spanish ship of war shall have a right to visit the merchant ships of either nation, suspected to be engaged in the slave trade; and, if they find any slaves on board, may bring such ships and persons for judgment before the nearest tribunal established for that purpose; but either power to pay damages for any illegal detention or bringing in. And such seizures to be made only by king's ships, and by vessels provided with special instructions for that purpose.

The *tenth article* marks with more precision the signification of the ninth, confining the seizure of slave ships to such only as shall have slaves actually on board.

The *eleventh article* stipulates, that all ships employed to prevent the slave trade, shall be provided with a copy of the instructions annexed to the said treaty.

The *twelfth,* and concluding *article,* stipulates that, for the trial of all ships seized in the illicit traffic of slaves, there shall be established two mixed commissions, formed of an equal number of persons of the two nations, named for that purpose by the respective sovereigns; and that these commissions shall reside, one in a possession belonging to his Majesty, the other within the territories of his Catholic Majesty: one of which commissions is directed by the said treaty to be always held upon the coast of Africa; and the other, in one of the colonial possessions of his Catholic Majesty.

Annexed to the treaty is the copy of instructions required to be given to king's ships employed in preventing

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this traffic; but, as it contains nothing more than the substance of the treaty, reduced into practical directions for the use of commanders, it is unnecessary to repeat them.

Annexed, likewise, to the treaty is another paper, intituled, "Regulations for the mixed commissions which are to reside on the coast of Africa, and in a colonial possession of his Catholic Majesty." These regulations consist of thirteen articles; and being imperative upon our ships, and of authority in our courts, must be briefly noticed as part of our Navigation Law:—

The *first article* stipulates, that these mixed commissions shall decide, first, upon the legality of the capture; and, secondly, in case the captured vessel shall be liberated, upon the costs of such detention. Sentence to be given within twenty days from the cause being in court; but two months to be granted in the event of the absence of witnesses, or a further time, but never exceeding four months, upon application by an interested party, with security for costs and damages.

The *second article* regulates the composition of the mixed commission. The Kings of England and Spain are each to name a commissary-judge, and a commissioner of arbitration; the proceedings are to be written in the language of the country in which the commission shall reside; the judges are to take an oath to judge fairly and impartially; and the acts of the court are to be registered by a secretary appointed by the sovereign of the country in which the commission shall sit.

The *third article* regulates the form of process, which is to consist of three parts: 1st, the examination of the papers of the vessel; 2nd, the deposition on oath of the captain and of two or three of the crew of the detained vessel, and of the captor; and, 3dly, in the event of the two commissary judges not agreeing upon the sentence, whether as to the legality of the detention, or the indemnification to be allowed, or upon any other question which might result from the stipulations of the treaty, they are directed to draw by lot the name of one of the two commissioners of arbitration, who, after having considered the documents of the process, shall consult with the commissary judges upon the case in question; and the final sentence shall be pronounced conformably to the opinion of the majority of the commissary judges, and of the commissioner of arbitration so chosen.

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The *fourth article* exempts from seizure any Spanish slave ships which shall have originally embarked from any part of the coast of Africa south of the equator, though the slaves may have been marched to such place of embarkation from any part of Africa north of the equator.

The *fifth article* requires the captain to state, in his declaration, the name of himself and vessel; the latitude and longitude of the place of seizure; and the number of slaves so seized. The *sixth article* regulates the restoration of the vessel, and the payment of damages in the event of the ship being liberated; and the *seventh article* orders, that in the event of condemnation, the ship and cargo (excepting the slaves) shall be lawful prize, and shall be sold for the profit of the two governments: but that the slaves shall receive from the mixed commission a certificate of emancipation, and shall be delivered over to the government on whose territory the commission, which shall have so judged them, shall be established, to be employed as servants or free labourers.

The *eighth article* (in the event of the liberation of the ship) enumerates the several grounds of damages and compensation to be paid by the captors, namely, according to the damage done or suffered *pro tanto* to the ship, stores, freight, cargo, demurrage, &c. but as all these articles conform to the practice of our admiralty courts, it is

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unnecessary to repeat them. The *ninth article* confines the compensation for slaves illegally seized to the value of such a number of them as the vessel might legally carry; the *tenth* prohibits the judge, commissary, and secretary of the commission from receiving any emolument for the performance of their duties from any of the parties; the *eleventh* gives to any party (who may imagine himself aggrieved by the sentence of the court) the right of representing his case to his government. The *twelfth article*, in the event of any aggravated illegal capture, empowers the government of the detained vessel to demand reparation to be made to itself, and require the government to which the captor belongs to inflict a punishment according to the offence. And the *thirteenth* and concluding *article* regulates the manner in which the vacancies of the commission shall be supplied in the event of death, &c.

In order to execute the stipulations of this treaty, and the regulations and instructions annexed, the 58 Geo. III. c. 36. was passed. Following, and nearly repeating the words of the treaty, this statute enacts, that all British ships of war, duly authorised, may seize all Spanish suspected vessels; and that British vessels suspected of having slaves on board may be visited, searched, and seized, by British or Spanish vessels, (duly authorised, and having a copy on board of the special instructions required in the said treaty,) and being so seized, may be carried for adjudication before the tribunals appointed by the treaty, and shall be liberated or condemned in the manner appointed by such treaty, repeated in this act in confirmation of the same. The statute then proceeds to enact the several articles of the treaty, with no other material alteration than a provision that the institution of the mixed commissions should not affect the jurisdiction of prize courts of appeal, or of admiralty courts, in cases brought before them; 58 Geo. III. c. 36.

The treaty with Portugal is next in order: the three

Treaty with Portugal, *July* 1817.

first articles of this treaty repeating the substance of a convention signed between England and Portugal, Jan. 22, 1815, contain only the declaration, that the two courts had agreed in that convention, that the Portuguese traffic in slaves should continue to be lawful in the following territories:—first, in the territories possessed by the crown of Portugal upon the coast of Africa to the south of the equator; that is to say, upon the eastern coast of Africa, the territory laying between Cape Delgado and the Bay of Lourenco Marques; and upon the western coast, all that which is situated from the eighth to the eighteenth degree of south latitude; secondly, in those territories on the coast of Africa, to the south of the equator, over which his most faithful Majesty has declared that he has retained his rights, namely, the territories of Molembo and Cabinda, upon the western coast of Africa, from the fifth degree twelve minutes, to the eighth degree south latitude. By the third article his Majesty engages to promulgate a law in his dominion which should prescribe the punishment of any of his subjects engaging in the slave trade; and, by the fourth article, every Portuguese ship destined for the slave trade on any point of the coast of Africa, where the traffic in slaves continues lawful, is to be provided with a royal passport, conformable to the modes annexed to the convention, and which model forms an integral part of the same. By the fifth article, the ships of war of both countries respectively are empowered to visit all merchant vessels of the two nations, suspected upon reasonable grounds of having slaves on board, acquired by illicit traffic. The two contracting parties agree to make good any losses which their respective subjects may incur unjustly by the arbitrary and illegal detention of their vessels. By sixth article, no British or Portuguese vessel shall detain any ship not having slaves *actually* on board; and by the seventh, all ships of war of the two nations shall be furnished by their own government with a copy of the instructions annexed to the said convention; such instructions to be written in both languages, and signed by the minister of

Treaty with Portugal.

their respective marine, with a reservation of the power of altering such instructions according to circumstances. By the eighth article two mixed commissions are to be established, named by their respective sovereigns; one to reside within the territories of Portugal, and the other within the territories of the king of Great Britain: one always to be held upon the coast of Africa, and the other in the Brazils. The ninth and tenth articles relate to the indemnification to be granted to all the proprietors of Portuguese vessels and cargoes, captured by British cruizers, between June 1, 1814, and the period at which the two commissions pointed out in the eighth article of the convention shall assemble at their respective posts. By the eleventh article, the king of Great Britain engages to pay the 300,000*l.* indemnification, (stipulated by the convention of 21 Jan. 1815,) in favour of the Portuguese vessels captured by British cruizers, up to the period of June 1, 1814. The article prescribes the manner of payment. By the twelfth article, the form of passport for the Portuguese ships destined for the lawful traffic in slaves; the instructions for the ships of war of both nations destined to prevent the illicit trade in slaves; and, thirdly, the regulations for the mixed commissions, which are to hold their sittings on the coast of Africa, at Brazils, and in London, are directed to be received as an integral part of the convention.

Annexed to this treaty are instructions framed according to the convention, and regulating its practical execution. The regulations for the mixed commissions differ very little from those of the Spanish convention. They are equally framed with the view of preventing this traffic, and proceeding to a summary adjudication upon all vessels engaged in it; but, at the same time, they are cautiously conceived, so as to execute justice in all cases beyond suspicion; to prevent capricious and unlawful detentions, and to give indemnity to all persons who may be aggrieved by the abuse of the powers of visit and search with which the two nations have respectively entrusted the commanders of their ships of war.

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To give effect to this treaty, the 58 Geo. III. c. 85. was passed, by which British ships of war are authorised to seize all vessels suspected, upon reasonable grounds, of having slaves on board acquired by illicit traffic. This act, moreover, carries into effect all such other articles of the above convention which required the confirmation and authority of the legislature.

Treaty with Denmark.

For the like humane purpose, articles have been introduced into the treaties entered into between his Britannic Majesty and the other powers of Europe. By the treaty with Denmark, his Danish Majesty engages, according to the eighth article, to co-operate with his Britannic Majesty in the abolition of the slave trade, and to prohibit all his subjects, in the most effectual manner, and by the most solemn laws, from taking any share in such trade.

Treaty with the king of the Netherlands.

By the treaty with the king of the Netherlands, (May, 1818) the sovereign of those countries engages to co-operate in the most effectual manner with the king of Great Britain, in order to bring about a total abolition of the slave trade on the coast of Africa and to prohibit all his subjects, by penal laws the most formal, from taking any share whatsoever in such inhuman traffic.

Treaty with France.

By the treaty of Paris, May 1814, his most Christian Majesty, "concurring without reserve in the sentiments of his Britannic Majesty, with respect to a description of traffic repugnant to the principles of natural justice, and of the enlightened age in which we live, engages to unite all his efforts to those of his Britannic Majesty, at the approaching congress, to induce all the powers of Christendom to decree the abolition of the slave trade, so that the said slave trade shall cease universally, as it shall cease definitively, under any circumstances, on the part of the

Slave trade.

French government, in the course of five years; and that, during the said period, no slave-merchant shall import or sell slaves, except in the colonies of the state of which he is a subject. (*n*)" And by the definitive treaty of Paris, of 20th Nov. 1815, there is this further stipulation in an additional article:—"The high contracting powers, sincerely desiring to give effect to the measures on which they deliberated at the Congress of Vienna, relative to the complete and universal abolition of the slave trade, and having, each in their respective dominions, prohibited, without restriction, their colonies and their subjects from taking any part whatever in this traffic, engage to renew conjointly their efforts, with the view of securing final success to those principles which they proclaimed in the Declaration of the 4th Feb. 1815, and of concerting, without loss of time, through their ministers at the Courts of London and Paris, the most effectual measures for the entire and definitive abolition of a commerce so odious, and so strongly condemned by the laws of religion and nature."

Treaty with the United States.

By the treaty with the United States of America, 24th Dec. 1814, it is stipulated by the contracting parties, in Article 10. in these words: "Whereas the traffic in slaves is irreconcileable with the principles of humanity and justice, and whereas both his Majesty and the United States are desirous of continuing their efforts to promote its entire abolition, it is hereby agreed that both the contracting parties shall use their best endeavours to accomplish so desirable an object."

(*n*) By 1st of the Additional Articles of the treaty, done at Paris, 30th May, 1814.

Cases and opinions.

Such is the British trade with Asia, Africa and America, as respects the navigation laws. It has been already explained in a former chapter what is meant by British *built* ships and British seamen. (*o*)

Of the meaning of the words growth, produce, and manufacture of a country.

As respects our trade with the three great continents, there was some doubt in the earlier part of our navigation system, as to the true construction of the words, growth, produce and manufacture: the origin of these doubts was a case before the commissioners of the customs, in which a question was made, whether sugar of the French plantations in America, being imported into France, and there refined, the molasses of those sugars could be imported into England as a manufacture of France; and, as such, whether they ceased to be subject to the prohibition under which they would lie, while merely a production of America. This question being submitted to Mr. North, (*p*) a very eminent lawyer of that period, he replied to it by an opinion, which it will be useful to state in a condensed form, the principles of it being such as may be extended beyond the case. His opinion states in substance, that the question submitted to him, and all of a similar nature, turned wholly upon the following considerations. First, goods of the growth of the Indies, manufactured in France, might be brought from thence; as wrought silk, cabinets, and other articles. Secondly, if in the working of such manufactures there were a refuse or waste, although the labour of man went to the severing of it, and although it might have also some peculiar uses, yet that refuse or waste was not properly a manufacture, but retained the quality of the original material, and could not be imported as the manufacture of the place where the separation was made. Of this sort was the waste of silk, the chips or shavings of wood, or the like. Thirdly, if a plain separation was made, without any manufacture at all, the case was more

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(*o*) See *ante*, page 71 and 72.

(*p*) Reeves, 125.

Of the meaning of the words growth, produce, and manufacture of a country.

clear; as the garble or siftings of spice; though it had a new name and peculiar uses, and was severed by men's labour, yet it was still, in the sense of the act, the *production* of the spice country, and not the *manufacture* of the place where it was sifted. In the present case the question was, whether a mixture of other materials, together with a long process of boiling, curing, and other labour and operations necessary for effecting such a separation, should make the refuse, waste, or dregs to be a *manufacture* in the sense of this law, and not the goods of the original *production?* And he thought it did not.

This question, concerning the manufacturing in Europe of articles the production of Asia, Africa, or America, was brought to a conclusion by a determination of the Court of Exchequer, in 18 Geo. III. Some ostrich feathers of African produce were brought to France, and there dressed, and from thence imported into this kingdom. This manufacturing in France appeared to the Court such as to justify the importation under the act of navigation. But to prevent the mischief that might ensue to that and various other manufactures in this kingdom, if this practice should be sanctioned by law, an act was passed, 19 Geo. III. c. 48., which ordains that the provision in the fourth section of the act of navigation should not be construed to permit any goods or commodities whatsoever, of the growth or production of Africa, Asia, or America, which shall be in any degree manufactured in foreign parts, to be imported or brought into the kingdom of Great Britain, Ireland, Guernsey, Jersey, or the isle of Man, unless they shall be manufactured in the country or place of which they were the growth and production, or in the place where such goods and commodities can be only, or are first shipped, and from no other country or place whatsoever. But this prohibition is not to prevent the importation of oil of cloves, oil of cinnamon, oil of mace, or oil of nutmegs, or any of the goods or commodities which are permitted to be imported under particular circumstances and restrictions, by an act passed since the act of navigation, and in force at the time of passing this act.

Again, another difficulty arose about the same period, with respect to the exact compass of the words of the same clause of the navigation act, "*shall not be shipped or brought from any place or country, but only those of their growth, &c.*"

This doubt likewise arose upon a case before the commissioners of customs. Some worm-seed, which is a drug of Turkey, and the growth of Asia, was imported from Leghorn in an English built ship, and was alleged to have been previously brought to Leghorn in another English-built ship. This case being laid before the eminent counsel of that time, it was agreed that a *direct* importation, within the meaning, though not within the words of the law, was to be an importation from the place of their growth, of the commodity so imported into England, by British-built shipping *all the way*, and not partly by English-built shipping, and partly by foreign ships; but whether by one or more ships was not material, for the law intended to encourage and increase English-built shipping in general, and to restrain foreign ships from such trade; and perhaps it might be difficult to get an English ship to pass, with a small parcel of drugs, quite through to England from the place of their growth, though easy enough to get one English ship to Leghorn, and another for England. (*p*) This question came again before the commissioners of the customs, and the law officers of the Crown, at a later period, and in a case in which the circumstances were more distinct. A parcel of hard soap, bought in Turkey, the place of its production and manufacture, (such as was usually imported from Smyrna) was carried in English shipping to Hamburgh, and continued there on the account of the importer. It was held in this case, that

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(*p*) Reeves 131.

the importation of this soap into England in an English ship would not be contrary either to the words or meaning of the act of navigation; for it was fetched all along in English-built shipping duly qualified; and though last brought from Hamburgh, which was not the place of its production or manufacture, nor the usual port where first shipped for transportation, yet it was brought thither from the proper place in English shipping duly navigated, by the same person (or upon his account) who fetched it from Hamburgh, and the property continued all along in him.

Where clauses of statutes mention *direct importation*, the general construction of those words is to be taken as intending a *continued* voyage. But where a deviation is made by stress of weather, or other exigency, or when by necessity the goods were taken out upon the sea and put into another ship; these are held not to be deviations from the continued voyage. (*q*) Thus, drugs of the growth of Barbary were shipped there in an English-built ship, bound for London, but which was in her voyage to touch at Lisbon. On her arrival there she was found leaky, and incapable of proceeding on her voyage; the drugs were therefore removed directly out of that ship, without landing, on board another ship, English built; and this was held to be a *direct* importation from Barbary, the changing the ships being for necessity.

But, unless in a case of necessity, *the direct importation* required by the navigation act is not judged to be fulfilled by the whole of the voyage being performed in a British ship, but it must be in the same ship; for if trans-shipping were allowed, it would be very difficult to prove whether the former voyage was performed in a legal way; and the provision might thus be easily evaded. However, when a ship has suffered such damage as to be unladen at some port, and the goods are put into another British vessel,

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(*q*) See ante, page 77, 78.

the importation is always considered as a continuation of the first voyage. But this is a case of necessity, and it must be proved before the importation is allowed. (*r*)

Of the port where goods are to be shipped, &c.

Another question has occasionally arisen as to the compass of the words, *the ports where goods can only, or are, or usually have been, first shipped for transportation*, but this doubt, whenever a case has occurred of late years, has always been solved by considering it as a question of fact; namely, whether the place in question was in fact the usual port of shipping or not. But a practice now obtains which makes it no longer necessary to enquire for the *usual port* for shipping in America, the whole continent and islands being considered as one place. Accordingly, some produce of the United States having been sent into Canada through the Lakes, and thence exported into this country, and the opinion of the law officers being taken as to the legality of such importation, they unanimously replied that the importation of the produce of that part of America which constitutes the territories of the present United States, having been lawful before their separation from Great Britain, must continue to be so unless specifically prohibited by some law for the purpose. This opinion was sanctioned by stat. 30 Geo. III. c. 29., which allows goods, the produce of countries bordering on Quebec, and legally imported there, to be exported to Great Britain. (*s*)

Of importations from Gibraltar.

The permission to import African goods direct from Gibraltar is another deviation from the policy of our navigation laws. This rests upon the 27 Geo. III. c. 19., by which it is permitted to British-built vessels, navigated and registered according to law, to import any goods of the growth or production of the dominions of the Emperor of Morocco, which shall have been imported into Gibraltar *directly* from any port of the said dominions not lying to the southward of the port of Mogadore. The vessels im-

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(*r*) Reeves, 138.

(*s*) Reeves, 140, 141.

porting such African goods into Gibraltar must either be British built, or the property of the subjects of the Emperor of Morocco; and such goods must be accompanied with a certificate under the hand of the Governor of Gibraltar, setting forth that they were brought into Gibraltar in the manner described.

The trade with the East Indies, and the exclusive charter of the Company, have necessarily introduced some qualified relaxations of the navigation laws, which we have for the most part pointed out in the commencement of this chapter. With respect to the importing through Russia the produce and manufactures of Persia and Armenia, by the Russian Company, a question formerly arose, and was submitted to the law officers. They were of opinion that the privileges granted to the Russian Company, of importing through Russia the produce and manufactures of Armenia, *Major* or *Minor*, Media, Hyrcania, Persia, or the countries bordering on the Caspian Sea, ceased by the act of navigation, by which all goods of foreign growth and manufacture are prohibited under severe penalties or forfeitures from being brought into England, Ireland, &c. from any place or places, country or countries, but only from those of their growth and manufacture, &c. They were likewise of opinion that, if there could be a doubt upon this point, the exclusive charter of the East India Company entirely took away this trade. (*t*)

Relaxation of the navigation laws in the East India trade.

By 42 Geo. III. c. 20., the East India Company are allowed to import and export goods from and to India and China, in ships not British built, during the continuance of their charter; and by 53 Geo. III. c. 155, by which act the trade of the East India Company is opened to the British merchant, it is made lawful for His Majesty's subjects, in ships navigated according to law, to import into the United Kingdoms, from all places within the limits of the

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(*t*) Chalmer's Collection of Opinions, Vol. II. p. 298.

Company's charter, (except the dominions of the Emperor of China) any goods, the product or manufacture of any country within the limits of the said Company's charter, except *tea*, although such goods *may not be of the growth*, &c. of the place where they are shipped, &c. (*u*) And by the 57 Geo. III. c. 95. we have already shewn, that the navigation acts do not extend to, or in any way affect the importation or exportation by the East India Company, or by any other of His Majesty's subjects, (in British registered vessels, &c. or trading under the provisions of 55 Geo. III. c. 116.) of any goods, at, into, or from any place within the limits of the charter of the said Company; nor do they affect the importation or exportation at, into, or from any place whatsoever, in such vessels as aforesaid, of any goods, of the growth, &c. of any place within the limits aforesaid, or require that any bond for the exportation or importation of goods in any particular manner shall be given in respect of any such vessels, bound to or from any place within the limits aforesaid. (*x*)

During the continuance of the exclusive trade of the East India Company, and during the term for which the possession of the British territories in India is secured to the Company, it is made lawful for the vessels of countries and states in amity with His Majesty to import into and export from the British possessions in India such goods as they shall be permitted to import into, and export from, the said possessions, by the Directors of the Company; who are required to frame such regulations for carrying on this trade as may be most conducive to the interest and prosperity of the British possessions in India, and of the British Empire. It is not, however, lawful for the Directors to frame any regulations for the conduct of this trade, between India and the States in amity with the Crown of Great Britain, which shall be inconsistent with any treaty

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(*u*) See *ante*, page 93, 94, 95, where this statute is more fully set out.

(*x*) See *ante*, page 96.

made or entered into by His Majesty, or which may be inconsistent with any act of Parliament passed for the regulation of the trade and commerce of the British territories in India. (*y*) 37 Geo. III. c. 117.

The 26 Geo. III. c. 60, considerably affected the shipping employed in the foreign trade with Asia, Africa, and America. This act puts an end to foreign ships, British owned, by taking from them the privileges of a British ship; so that the trade of Asia, Africa and America, after that act, was to be carried on in British built ships, equally with the plantation trade. It was further affected by 34 Geo. III. c. 68. Hitherto the navigation system had confined all its restrictions upon shipping, whether British or foreign, to the importing of goods only, except, indeed, the exporting of goods from the British plantations; but this act goes further, and enacts, that no ship, registered or required to be registered as a British ship, shall be permitted to export any articles whatsoever, unless manned with, and navigated by a master, with three-fourths at least of the mariners British subjects. So that now the exportation to foreign places in Asia, Africa and America must be made by the same sort of shipping and navigation as the importation hitherto had been. (*z*)

War acts. During the late war, it became necessary on some occasions to relax the navigation acts, as respected this trade. Such relaxations, inasmuch as they superseded the established laws, were necessarily made by the authority of the legislature; and His Majesty was empowered to grant licences, by and with the advice of his privy council, for the legalizing of such trade. (*a*) But as this system grew

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(*y*) See *ante*, of the trade between America and India, p. 46.

(*z*) Reeves, 320. As to the trade between Great Britain and America, in British, or in American built ships, *respectively*, see *ante*, page 45, 46.; and as to the relaxation of the navigation act in favour of the Portuguese dominions in South America, see page 102.

(*a*) 39 and 40 Geo. III. c. 34. 43 Geo. III. c. 153. 45 Geo. III. c.

out of the state hostilities, so it terminated with them; and it thus becomes unnecessary to examine it under the present head.

Law cases and decisions.

With respect to the trade which we have been occupied in discussing, few cases have arisen in our common law courts. Before the 37 Geo. III. c. 117, which allowed ships in amity with this country to bring goods from India, a question arose in the Court of Common Pleas on the validity of an insurance upon goods on board a Danish ship under the following circumstances: The plaintiffs were subjects of Denmark, and resident in Copenhagen, and the ship was a Danish vessel. The cargo was taken on board at Calcutta; and on the voyage from Calcutta to Copenhagen, she was captured by the French. An action being brought against some British underwriters who had insured her, an objection was taken to the plaintiff's right of recovery on the ground of its being illegal, by the 12 Car. II. c. 18., to export goods from Calcutta in any ship not belonging to a British subject; and this objection being admitted by Lord Alvanley, the plaintiffs then insisted that if the exportation from Calcutta were illegal, the risk never commenced, and that the plaintiffs therefore were entitled to a return of premium. The Court, upon argument, held, that the ship having loaded at Calcutta, contrary to 12 Car. II. c. 18., the assured was not entitled to recover back the premium, even though it appeared that the practice of loading foreign ships at Calcutta had prevailed for a length of time, and had been authorized by act of parliament soon after the shipment in question. (*b*)

A similar point was again raised in the case of Chalmers *v.* Bell. (*c*) A Swedish ship was insured at and from her loading port in the East Indies to Gottenburgh, and part

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34. There were several other acts passed for this purpose.

(*b*) Morck and Another *v.* Abel, 3 Bos. & Pull. 35.

(*c*) 3 Bos. & Pull. 604.

of the cargo was laden in a British port in the East Indies. Upon the ship being captured by a French privateer, the court determined that the assured could not recover, upon the ground of the contract being in contravention of the navigation laws. The argument for the plaintiff in this case was, that the prohibition of foreigners to trade to India was repealed by the 33 Geo. III. c. 52., and that the restrictions of the navigation laws, as respected foreigners, were done away with previous to the 37 Geo. III. But the court was of opinion that the navigation laws were not repealed with respect to the East Indies by the clauses in the 33 Geo. III.

In the case of Camden *v.* Anderson, in K. B., a question arose as to the exclusive right of trading to the East Indies claimed by the East India Company; and the court was of opinion, that such exclusive right as had been granted by 9 and 10 Will. III. c. 44., had never been put an end to; and any infringement of it was a public wrong; and though such parts of that act as inflicted penalties, &c. were repealed by 33 Geo. III. c. 52., (which secures the exclusive trade to the Company,) it was competent to underwriters who had subscribed policies on ships trading to the East Indies, in contravention of the statute of Will. III., to avail themselves of the illegality of such trading in an action brought on the policies. (*d*) This judgment was afterwards affirmed by a court of error. (*e*)

In Wilson *v.* Marryat (*f*) it was determined by K. B that (under the treaty of peace between this country and America, in 1795,) it was not necessary that the trade from the United States to our settlements in the East Indies should be *direct;* but that it might be carried on circuitously by the way of Europe. (*g*)

(*d*) 6 T. R. 723.

(*e*) 1 B. and P. 272.

(*f*) 8 T. R. 31.

(*g*) The analogy of the case extends to a similar clause in the treaty of commerce with America, July, 1815, now extended to the year 1828 by the convention of October, 1818.

In the earlier period of the navigation acts, a question once arose as to the legality of returned goods; for example, where the goods had been originally imported from the place of their growth into the British dominions, and thence exported to some foreign port, where not finding a market, they returned to a British port. The question here was, whether such returned goods should be regarded as *returned*, or should pay the same duties as upon their first importation. It was determined upon this point, as well by an opinion of the law officers, as upon a judgment of Chief Justice Eyre, that such returned goods, their identity being ascertained, were not to be regarded as a new importation.(*h*)

But this privilege having been abused into a means of evading the law as respected tea, the stat. 11 Geo. I. c. 30., which complains that tea imported into Flanders and Holland from the East Indies, used to be imported into this kingdom, on pretence that it had been formerly exported from thence; to prevent such abuses in future, enacts, that no tea shall be imported but from the place of its growth, although it may have been formerly exported from hence. In other respects the practice seems to have been fully established, the only question being whether the allegation be the fact, or pretext.

In this view of our trade with Asia, Africa, and America, it will be seen, that within the last thirty years it has undergone nearly as much alteration as our colonial trade itself. The principal feature of the new system has been 1st, the permission to import goods of the growth or production of the United States, in ships belonging to the United States. 2d, A like permission to import goods of the growth and production of any of the Portuguese dominions and territories in Portuguese ships. 3d, A permission to import and export goods from and to India and China,

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(*h*) 1 Reeves 148.

in ships not British built, with other relaxations of the navigation laws as respects the East India trade, both with Great Britain and states in amity with her: 4th, the repealing of the act of Anne, (by which an exclusive trade was granted to the South Sea Company,) by 47 Geo. III. c. 28., and 55 Geo. III. c. 57.; 5th, the abolition of the African slave trade; 6th, the opening of a great portion of the trade of the East India Company, and, therein, the relaxation of a monopoly founded on the same principle with our colonial restrictions: 7th, by the new system introduced under the registry acts.

It is now very generally understood that trading monopolies do not tend to the public benefit; and that the kingdom loses more by their effect upon general trade, than the revenue gains by any remuneration which such companies can pay to the public stock. Hence, as far as may be consistent with public faith, it is not, perhaps, unreasonable to expect, that the whole system of these monopolies will gradually disappear; and, as the capital and ships of this kingdom certainly exceed those of any company or joint stock corporation, so the general merchant will no longer be excluded from any portion of British trade by the absurd pretext that his credit and capital would be insufficient. In these observations, however, it is not intended to direct any reflections against the East India company; a corporation which has always regulated their trade upon the liberal and enlarged principles of British merchants; and, if they have long possessed a lucrative monopoly, have not employed it as a means of extortion against the public. But in an examination of our navigation laws, and of our general commercial system, we should deem ourselves to be wanting in just and national feelings, if we did not occasionally remark upon the character of the system, and congratulate ourselves and country upon the gradual efforts of the legislature to amend and enlarge it. So far as any restrictions are necessary to uphold and augment our naval power, and so far as what is gained by our navy exceeds in public interest what is lost by our commerce, so far, and so far only, ought the less interest to be sacrificed to the greater, and our commerce made to pay its tribute to our great engine of national defence. But when our naval interest is in no degree concerned, and the question rests solely upon commercial principles, it will certainly not admit a doubt, that the utmost possible liberty should be given to commerce; and that, in the advanced state of its elements in the British dominions, all reasons for such monopoly, such, for example, as the collection of a sufficient capital by inviting merchants to make a joint fund, must have altogether ceased. Exclusive companies, therefore, however necessary in the early periods of our trade, have long ceased to bear any other character than that of impediments to our general commerce.

Summary.

Before we conclude this chapter, it will be necessary, though at the expence of some repetition, to state, by way of summary, the rules and exceptions which apply to the trade of which we have been treating; viz. of the trade between Great Britain, Asia, Africa, and America.

RULE I.

No goods or commodities of the growth, production, or manufacture, of Asia, Africa, or America, may be imported into Great Britain, in any other than in British built ships, owned by his Majesty's subjects, and navigated by a master, and three-fourths of the mariners, at least, British subjects. This prohibition is grounded on 12 Car. II. c. 18. s. 3., and 26 Geo. III. c. 60. s. 1. This latter act has put an end to foreign ships, British owned, being employed in this trade, by taking from them the privileges of a British ship.

Exception 1.—Goods of the growth, produce, and manufacture, of the United States, which are not prohibited by law to be im-

Summary.

ported from foreign countries, in vessels built in the countries belonging to the United States of America, or any of them, or in vessels taken by any of the vessels of war belonging to the government, or any of the inhabitants of the said United States, having commissions, or letters of marque and reprisal from the government of the said United States, and condemned as lawful prize in any court of Admiralty of the United States, (of which condemnation proof shall be given to the commissioners of customs, in England or Scotland respectively,) and owned by the subjects of the United States, &c. and whereof the master, and three-fourths of the mariners, at least, are subjects of the United States, 49 Geo. III. c. 59., and 56 Geo. III. c. 15. (*i*)

Exception 2.—Goods of the growth, produce, and manufacture, of any of the territories and dominions of the crown of Portugal, may be lawfully imported into the United Kingdom, in ships or vessels built in the said territories or dominions; or in ships or vessels taken by the ships or vessels of war belonging to the Portuguese government, or belonging to any subjects of the said government, having commissions, or letters of marque, or reprisals, from the Portuguese government, and condemned as lawful prize, in any court of admiralty in the Portuguese government, and owned by subjects of the Portuguese government, and whereof the master, and three-fourths of the mariners, at least, are subjects of the Portuguese government, 51 Geo. III. c. 47. (*k*)

Exception 3.—By the statutes regulating the trade of the East India Company, it is provided, 1st, that all vessels belonging to them, whether built or purchased by the said company, shall be deemed to be British ships, within the meaning of the 12 Car. II. c. 18., and that the said company shall be entitled, in respect thereof, to all the privileges and advantages by the said act given to the owners of ships wholly belonging to British subjects, the same being navigated in the manner prescribed by the laws now in being

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(*i*) See ante, page 45, 46.

(*k*) The 48 Geo. III. c. 11., of which we have before spoken, (*ante*, page 103,) is repealed by this latter act, the court of Portugal having removed to the Brazils, and thus rendered them a principal kingdom and seat of empire, instead of, as heretofore, a colony.

respecting British built ships, (*k*) 21 Geo. III. c. 65. s. 33.; and by 42 Geo. III. c. 20., the East India Company are allowed to import and export in ships not British *built.* 2nd, During the continuance of the exclusive trade of the East India Company, and during the term for which the possession of the British territories in India is secured to the said Company, it is made lawful for the vessels of countries and states in amity with his Majesty, to import into, and export from, the British possessions in India, such goods as they shall be permitted to import into, and export from the said possessions, by the directors of the said Company, who are directed to frame such regulations for carrying on the trade to and from the said possessions, and the countries and states in amity with his Majesty, as shall seem to them most conducive to the interest and prosperity of the British possessions in India, &c. 37 Geo. III. c. 117.—3d, All vessels built in the countries of the United States of America, and owned by American subjects, and whereof the master, and three-fourths, at least, of the mariners, are also subjects of the said States, are allowed to clear out from any port of the United Kingdom, for the following principal settlements in the East Indies; viz. Calcutta, Madras, Bombay, and Prince of Wales' island, with any goods which may be legally exported from the United Kingdom to the said settlements, in British *built* vessels, subject to the like regulations, penalties, and forfeitures, as are now by law imposed upon the exportation of such goods to the said settlements in British *built* ships, 56 Geo. III. c. 51. (*l*) Summary.

RULE II.

No goods or commodities of the growth, production, or manufacture of Asia, Africa, or America, may be shipped or brought from any other place or country, but only from

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(*k*) As to the registering of ships in India, see page 95, and 55 Geo. III. c. 116.—As to the employment of Asiatic sailors, and Lascars, see page 95 and 96, ante.

(*l*) See *ante*, page 45, 46.—The late convention of commerce between Great Britain and the United States, (Oct. 1818,) extends this privilege to the year 1828; viz. ten years from the date of the above treaty.

Summary.

those of their growth, production, or manufacture, or from those ports where they can only, or are, or usually have been, first shipped for transportation. This restriction applies as well to our colonial trade, as to the general trade with Asia, Africa, and America, 12 Car. II. c. 18. s. 4.

Except. 1.—Goods and commodities of the Streights, or Levant seas, from the usual ports or places of lading them, within the said Streights, or Levant seas, 12 Car. II. c. 18. s. 12.—East India commodities, from the usual ports of lading them to the southward and eastward of the Cape of Good Hope, and from Ireland, *idem*, s. 13. (*m*) Goods imported from Spain, Portugal, the Azores, Madeira, or Canary islands, *idem*, s. 14. : bullion and prize goods from any port, in any sort of ships, *idem*, s. 15.

Exception 2.—Jesuit's bark, sarsaparilla, balsam of Peru, and Tolu, and all drugs of the produce of America, from the British plantations, 7 Ann. c. 8. : raw silks, or other goods of Persia, from any place belonging to the emperor of Russia, in British built ships, 14 Geo. II. c. 36. Cochineal and indigo, from any port, in British ships, or ships of a state in amity with Great Britain, 57 Geo. III. c. 23. (*n*) Gum senega, 25 Geo. II. c. 32 : coarse printed calicoes, cowries, arangoes, and other East India goods, prohibited to be worn here, from uny port in Europe, in British ships, 5 Geo. III. c. 30. Cotton wool, and goat skins, raw or undressed, from any place in British built ships, 6 Geo. III. c. 52., and 15 Geo. III. c. 35. Goods, the merchandise of the dominions of the emperor of Morocco, from Gibraltar, in British built ships, 27 Geo. III. c. 19. ; and by 51 Geo. III. c. 47. s. 4. Elephants' teeth and ivory are allowed to be imported from any of the dominions of the crown of Portugal, in British or Portuguese ships, respectively, though such commodities may not be of the growth, produce, &c. of any of the dominions of Portugal.

(*m*) See *ante*, of the East India trade in this chapter, and 33 Geo. III. c. 63. for Ireland.

(*n*) As to the exceptions stated above, see page 86, and following pages in this chapter.

CHAPTER IV.

THE EUROPEAN TRADE.

EIGHTH SECTION OF THE NAVIGATION ACT—EASTLAND COMPANY—THE RUSSIA COMPANY—THE TURKEY COMPANY—OF THE SHIPPING WHICH MAY BE EMPLOYED IN THE EUROPEAN TRADE—OF THE COUNTRY OF THE MASTER AND MARINERS—ACT OF NAVIGATION DISPENSED WITH DURING WAR—THE DUTCH PROPERTY ACT—THE NEUTRAL SHIP ACT—OF THE LICENSING SYSTEM—LATE TREATIES WITH EUROPEAN STATES—RULES AND REGULATIONS OF THE EUROPEAN TRADE.

THE next division of our subject is the European trade. What the act of navigation of Charles II. requires with respect to this branch of our general shipping, and what alterations have been introduced from the 12th of Charles II. to the present time, will be the subject of this chapter.

As far as respects the navigation act of Charles II. the European trade of England is regulated by the eighth section of that statute, in which it is enacted, that no goods or commodities of the growth, production, or manufacture of Muscovy, or of any of the countries, dominions, or territories, to the Great Duke or Emperor of Muscovy or Russia belonging; as also that no sort of masts, timber, or boards, no foreign salt, pitch, tar, rosin, hemp, or flax, raisins, figs, prunes, olive oils, no sorts of corn, or grain, sugar, pot ashes, wines, vinegar, or spirits called *aqua vitæ*, or brandy wine, shall, from and after the first day of April, which shall be in the year of our Lord 1661, be imported into

12 Car. II. c. 18. s. 8. England, Ireland, Wales, or town of Berwick-upon Tweed, in any ship or ships, vessel or vessels whatsoever, but in such as do truly and without fraud belong to the people thereof, or some of them, as the true owners and proprietors thereof, and whereof the master and three-fourths of the mariners, at least, are English. And that no currants nor commodities of the growth, production, or manufacture, of any of the countries, islands, dominions, or territories, to the Othoman or Turkish empire belonging, shall, from and after the first day of September, which shall be, in the year of our Lord 1661, be imported into any of the aforementioned places in any ship or vessel, but which is of English built, and navigated as aforesaid, and in no other, except only such foreign ships and vessels as are of the built of that country or place of which the said goods are the growth, production, or manufacture, respectively, or of such port where the said goods can only be, or most usually are, first shipped for transportation, and whereof the master, and three-fourths of the mariners, at least, are of the said country or place; under the penalty and forfeiture of ship and goods.

Sect. 9. It is further enacted in the same act, that for the prevention of the great frauds used in colouring and concealing of alien goods, all wines of the growth of France, or Germany, which shall be imported into Great Britain, in any other ship or vessel than which doth truly and without fraud belong to England, Ireland, Wales, or town of Berwick-upon-Tweed, and navigated with the mariners thereof, as aforesaid, shall be deemed alien goods, and pay all stranger's customs and duties, as also to the town or port into which they shall be imported; and that all sorts of masts, timber, or boards, as also all foreign salt, pitch, tar, rosin, hemp, flax, raisins, figs, prunes, olive oils, all sorts of corn or grain, sugar, pot ashes, spirits commonly called brandy wine, or *aqua vitæ*, wines of the growth of Spain, the islands of the Canaries, or Portugal, Madeira, or western islands, and all the goods of the growth, production, or manufacture, of Muscovy, or Russia, which shall be imported into any of the aforesaid places in any other than such shipping, and so navigated; and all currants and Turkey commodities which, from and after the first day of September 1661, shall be imported into any of the places aforesaid, in any other than English built shipping, and navigated as aforesaid, shall be deemed alien's goods, and pay accordingly, s. 9. (*a*)

It was provided, however, that this clause should not extend to impose alien duties upon corn the growth of Scotland, salt made in Scotland, fish caught and cured by the people of Scotland, nor to seal oil of Russia, imported in Scotch or Russian ships, but whereof the master, and three-fourths of the mariners, were at least English, s. 16.

Act of frauds. 13 and 14 Car. II. c. 11.

Though the necessary effects of this act upon European trade excited a very general discontent upon the part of the merchants, and several efforts were made to procure its repeal, the legislature, becoming only more confirmed in their purpose of encouraging the navy and sailors of England, not only withstood all solicitations, but even increased these restrictions, by passing the *Act of Frauds.* This is the stat. 13 and 14 Car. II. c. 11. the object of which was to meet and prevent some practices by which the navigation law was eluded, and particularly that of fetching plantation goods from Holland, and the Netherlands, under the pretext of their having undergone some process by which they were rendered Dutch manufactures. To prevent this practice the 13 and 14 Car. II. c. 11. enacts, that no sort of wines, (other than Rhenish) no sort of spicery, grocery, tobacco, potash, pitch, tar, salt, rosin, deal boards, fir timber, or olive oil, shall be imported into England, Wales, or Berwick, from the Netherlands or Germany, upon any pretence whatsoever, in any sort of

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(*a*) Stat. 24 Geo. III. c. 16. abolished all alien duties.

ships or vessels whatsoever; an act which, beyond any former act or ordinance, aimed fully and directly against the great object of the Dutch to become the emporium of Europe.

Relaxation of the act of frauds.

Some inconveniences of this act, however, became gradually manifest even in this period of our navigation laws, and were accordingly corrected by partial relaxations, though the legislature had the firmness, perhaps it may be added the wisdom, to persevere in their original policy. The first of these relaxing statutes is the 1 Ann. c. 12., by which Hungary wines are permitted to be imported from Hamburgh. The second, and indeed the only remaining act of this period, is stat. 6 Geo. I. c. 15., by which it is permitted to the king's subjects to import fir timber, fir planks, masts, and deal boards, of the growth of Germany, into this kingdom, in British built ships only, owned by his Majesty's subjects, and whereof the master, and three-fourths of the mariners, at least, are British subjects, on paying the same duty as the same articles pay when imported from Norway.

Trading Companies.

During this period, a considerable portion of the European trade was confined to certain exclusive companies. The principal of these corporate bodies were the Eastland Company, the Russia Company, and the Turkey Company. The first of these companies was created by a charter of Queen Elizabeth, in 1579, by which this company was to enjoy the sole trade through the Sound into Norway, Sweden, Poland, Lithuania, (excepting Narva) Prussia, Pomerania, Dantzic, Elbing, Koningsberg, Copenhagen, Elsinore, Finland, Gothland, Bornholm, and Oeland. The Russia Company had been created by a charter of Philip and Mary, and was confirmed by a statute passed in the eighth year of Elizabeth. Under their charter the company possessed the sole privilege of trading to and from the dominions of the emperor of Russia, as also to the countries of Armenia, Major or Minor, Hyrcania, Persia, and the Caspian sea. The Turkey Company, or, as it is termed in the charter, the Company of Merchants trading to the Levant, was formed by a charter in the third year of James I. and confirmed by letters patent in the thirteenth year of Charles II. The two conditions of admission into this Company were, that the candidate should be a merchant and free of the city of London, and should pay to the Company a fee of admission of twenty-five pounds if under twenty-six years of age, and fifty pounds if exceeding it.

Eastland Company.

The legislature, indeed, in order to compensate the general merchants for the restrictions of the navigation laws, had the wisdom to pass several acts for opening these private monopolies. The first of these useful acts is the stat. 25 Car. II. c. 7., by which every one of His Majesty's subjects was permitted to trade to and from Greenland, and there take whales and all other fish, and to import into this kingdom all sorts of oils, blubber, and fins. The same statute proceeds, in its ensuing clauses, to open the whole trade to Sweden, Denmark, and Norway, to every British subject or foreigner; and further enacts, that every subject of this realm might be admitted into the Eastland Company upon paying forty shillings.

Russia Company.

The second of these statutes, thus relaxing the monopoly of exclusive companies, was stat. 10 and 11 Will. III. c. 6., by which the Russian trade was laid open in a similar manner, the statute enacting, that every subject of the realm of England should be admitted into the Company upon payment of five pounds only.

Turkey Company.

A third statute, 26 Geo. II. c. 18, removed the restraints imposed upon general trade by the exclusive privileges of the Levant, or Turkey Company. It is enacted in this act, that every subject of Great Britain may be admitted into this Company upon paying the sum of twenty pounds, and that all persons free of that Company may, separately or jointly, export from Great Britain to any part or place within the limits of the letters patent, in any British ship owned and navigated according to law, to any person being a freeman of the Company, and a Christian subject; and may import, in the same manner, all goods not prohibited by law.

It has been seen that this branch of our general trade, which we term the European trade, and of which this chapter is treating, stands chiefly upon the eighth section of the act of navigation, and the act of frauds relating to the Netherlands. As this section of the navigation act, and indeed some part of the act of frauds, is very loosely worded, several important doubts have arisen with respect to their comprehension and construction. Some of the decisions in these questions are so solid and sagacious as to be useful in illustrating the law even of the present period. We shall, therefore, here cursorily annex such as have this character.

Cases and opinions.

The act prohibits the importation, from Germany and the Netherlands, of all wines except Rhenish. A question arose, whether this term, Rhenish, was to be taken literally and strictly, or whether the exception extended to all wines of the growth of Germany or the Emperor's dominions. The crown lawyers adopted the latter and more extended interpretation. But all doubts were removed by the stat. 22 Geo. III. c. 78., by which wines, being the growth, production, or manufacture of Hungary, the Austrian dominions, or any part of Germany, may come from the Austrian Netherlands, or any places subject to the Emperor of Austria, on the same duty as Rhenish wine, as also thrown silk, upon the same duty as if exported from Italy. (*b*)

Queen Anne having bought some French wines in Hol-

(*b*) Reeves, 165, 166, 167.

land for her own use, a question arose, whether they could be lawfully imported from thence. Sir James Montague was of opinion, that such an importation would be contrary to stat. 13 and 14 Car. II., which act, as a statute of general good, included the Queen; but that the Queen might buy the goods out of a neutral ship, and then order them on board some of Her Majesty's ships, and therein bring them to her own cellar or warehouse, the act not prohibiting the Queen from importing French wines. (*c*)

The port of Dunkirk having come into the possession of the crown of England, it became a question what was its character under the navigation laws. Sir Edward Northey was of opinion, that as Her Majesty's possession was provisional only, and not absolute, Dunkirk still remained a part of the Netherlands only.

The above questions arose under the act of frauds, but difficulties of more importance originated in the loose wording of the eighth section of the navigation act.

Cases on the eighth sect. of the navigation act.

The first question was, whether a Dutch-built ship, owned and navigated by Englishmen, could import wines from France, or timber from Norway. The stat. 12 Car. II. permitted such importation by such ships, manned with a master and three-fourths of the mariners English, upon payment only of such duties as the importer of them in English ships would pay. The 13 and 14 Car. II. c. 11. s. 6. (in order to diminish this practice of buying foreign ships) directed an account to be transmitted to the custom-house of all foreign-built ships made free in any of the ports of England; and enacted, that only such as should be in the list sent to the custom-house, and by them to the Court of Exchequer, before December, 1662, should enjoy the privilege of a ship belonging to England. The difficulty, therefore, was in the extension to be given to this last

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(*c*) Reeves, 171.

act; whether it entirely repealed the 12 of Car. II., or merely took away the equality of such foreign-built ships with those of English-built. The opinion of Sir Edward Northey, and other eminent council of that day, was, that the act was to be construed in the latter sense only, and therefore that such foreign-built, but British-owned and navigated ships, were not subject to forfeiture, but to all the duties of alien vessels. (*d*)

Upon the occasion of a war between the Danes and Swedes, the more important question arose, how the prize ships taken by one or the other of these powers should be regarded. Sir Edward Northey was of opinion, that a Danish ship being taken prize by the Swedes, and condemned in the Court of Admiralty in Sweden, the property was altered, and any British subject might lawfully purchase such ship; and such ship being owned by British subjects might import timber from Sweden; but Swedes being the owners of such a ship could not import timber from thence, such ship not being of the built of Sweden.

In the case of Scott *v.* D'Achez, (*e*) an English ship having become French property, had imported wines and vinegar from France, the master and three-fourths of the mariners being Frenchmen; she was, notwithstanding, held to be forfeited, though she had become French property before the importation. The judgment pronounced by Chief Baron Parker in this case is so valuable an exposition of the navigation law, (12 Car. II. c. 18.) and tends so much to explain the system, and the reason upon which it is founded, that we deem it to belong to the nature of our subject to give it nearly with the fulness of the original report by himself. "Before the making of this law, (he says) the Dutch, though they had little merchandize of the growth of their own country, had used to bring in their ships the growth and manufactures of all other kingdoms

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(*d*) Reeves, 172.

(*e*) Parker's Rep. 27, 29.

Exposition of the navigation law by Lord Chief Baron Parker.

in the world,—wine from France and Spain, spices from the Indies, and all commodities from other countries; and their navigation was not only a nursery for seamen, but brought in a great flow of wealth upon them. This being observed by the English, gave rise to the navigation act, which was first enacted in the time of the Usurpation, in 1651, as appears by "*Scobell's Collections*," and re-enacted in the 12th of King Charles II. with some few variations. Though this act concerned all other countries, yet it principally affected the Dutch, who, (as appears by Lord Clarendon's History, and Thurloe's State Papers,) were greatly alarmed, and made their remonstrances by their ambassadors for the repeal of it: but the English Government, then and ever since, found it so beneficial that they resolved to maintain it, and I hope ever will maintain it. (*f*) Upon this occasion, it may be proper to consider the drift and design of the act of navigation, which is expressly mentioned to be ,for the increase of shipping, and encouragement of the navigation of the English nation."

"The means proposed as most effectual for attaining this end, were by sect. 1. That the importation of all goods from any of His Majesty's dominions in Asia, Africa, or America, into England, Ireland, Wales, or Berwick-upon-Tweed, and the exportation from any of those places into any of his dominions in Asia, Africa, or America, should be in ships or vessels, truly and without fraud belonging only to the people of England or Ireland, dominion of Wales, or town of Berwick-upon-Tweed, or in vessels which were of the built of and belonging to any of the said lands, islands, plantations, or territories, and whereof the master and three-fourths of the mariners, at least, were English, under the penalty of the forfeiture of the ship and cargo."

"Section 3. prohibits the importation of goods from

(*f*) Clarendon's History, Vol. III. p. 2, 458. Thurloe's State Papers, Vol. II. p. 374.

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Africa, Asia, and America generally, without confining the prohibition to the King's dominions, but in such ships as belong to the people of England, &c., or of the plantations, and whereof the master and three-fourths of the mariners are English, under the same penalty. Section 4. That no foreign goods shall be imported into England, &c. but in *English* built shipping, or other shipping belonging to the aforesaid places, and navigated by *English* mariners as aforesaid, unless shipped from the place of which the goods were the growth, production, or manufacture, or in the port where they only can be, or most usually are, shipped for transportation. Section 6. No goods to be loaded or carried from one port of England to another, in any vessel belonging to a foreigner not made a denizen, or naturalized; and if in the vessel of a subject of England, it must be manned as aforesaid. By these methods all foreigners were excluded not only from the importation and exportation of any goods of the growth or manufacture of Asia, Africa, or America, into or out of England, Ireland, Wales, or Berwick, and from carrying them from one port to another, but were likewise restrained from bringing them into any European country for the use of the English, since the English could not import them from thence, which must contribute greatly to the increase of the English shipping and seamen, and the encouragement of their navigation. But though it was the policy of the legislature to prohibit the importation of all goods from Asia, Africa and America, unless brought in vessels of the King's dominions, whereof the master and three-fourths of the mariners were English, yet it was wisely foreseen, that if we restrained the importation or exportation of European goods, unless in our own ships, and manned in the manner directed by the act, other kingdoms and states would do the like; and that, in its consequence, would amount to a prohibition of all such goods, which would be extremely detrimental to trade, and defeat the very design of the act. To avoid this inconvenience, it is provided by the eighth section (upon which, and the 11th

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section, this cause principally turns) that no goods of the growth or manufacture of Muscovy, or any of the countries thereto belonging, no sort of masts, timber or boards, no foreign salt, pitch, tar, rosin, hemp or flax, raisins, figs, prunes, olive oils, no sort of corn or grain, sugar, pot ashes, wines, vinegar, or spirits called aqua vitæ, or brandy wine should be imported into England, Wales, or town of Berwick-upon-Tweed, in any ship or vessel whatsoever, but such as truly and without fraud did belong to the people thereof, and whereof the master and three-fourths of the mariners at least, are English; and that no currants, or other commodities of the growth or product of the dominions or territories of the Ottoman or Turkish empire, should be imported into any of the said places in any ship or vessel but which is English built, and navigated as aforesaid, and in no other, except only such foreign ships and vessels as are of the built of that country or place of which the said goods are the growth, production or manufacture respectively; or of such port where the said goods can only be, or most usually are first shipped for transportation, and whereof the master and three-fourths of the mariners at least, are of the said country or place, under the same penalty and forfeiture of ship and goods."

"Now to apply this clause to the present case:—This clause (as was observed by Mr. Solicitor General) consists of a prohibition and an exception; wines and vinegars (which are the cargo of this ship) are, among other goods, prohibited to be imported in any ship or vessel but such as truly and without fraud belonged to the people of England, and whereof the master and three-fourths of the mariners were English."

"But this ship is found to be French property, and to be navigated by a French master and mariners, and therefore is plainly within the prohibition in this clause."

"Let us next see whether it is within the exception: Ex-

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cept only such foreign ships and vessels as are of the built of that country or place of which the said goods are the growth, production, or manufacture respectively, or of such port where the said goods can only be, or most usually are, first shipped for transportation, and whereof the master, and three-fourths of the mariners, at least, are of the said country or place."

"This ship is found to be English built, and not of the built of France, and so wants one of the requisites to bring it within the exception. And the words ship, or vessel, of the built of the country or place, were not inserted by any accidental mistake, but intended by the legislature; for the same exception occurs in sect. 11. where forfeiture of office is imposed upon any officer of the customs who shall allow to any foreign built ship, bringing in the commodities of the growth of the country where it was built, the privilege by this act given to such ship, until examination and proof whether it be a ship of the built of that country, and that the master, and three-fourths of the mariners, are of that country."

"But it was objected, that the main design of the act was, that the English should be carriers, and not foreign nations, and therefore that they may carry as well in foreign built ships, being their property, as in ships of the built of their own country. By the clauses Mr. Bootle mentioned, Englishmen being the owners of foreign built ships, and qualifying them according to the 10th section, and manning them with a master, and three-fourths of English mariners, may undoubtedly navigate them as English ships; and it is enforced by the 11th section, which distinguishes between English and foreign property; and with respect to English property, the direction is, that if any officer of the customs shall allow the privilege of an English built ship, or other ship to any of the aforesaid places belonging, (that is, England, &c.) to any English or foreign built ship, coming into any port, and making entry of any goods until

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examination whether the master and three-fourths of the mariners are English, he shall forfeit his office; but in the case of foreign property, the enquiry is, (as I observed before,) whether the ship is of the built of the country of which the goods are the growth, and navigated by a master, and three-fourths of the mariners of that country. And this privilege is confined to ships being English property, and manned with English mariners, and cannot be extended to the present case of foreign property, without rejecting the word (built) which is mentioned in the eighth, and repeated four or five times in the eleventh section."

"But it was then insisted for the defendant, that if a foreign ship, purchased by an Englishman, may have the privilege of an English ship, *pari ratione*, or rather *à fortiori*, an English ship being foreign property, should be entitled to the like privilege, taking it (according to Mr. Solicitor's reasoning) that the encouragement of building ships is the secondary consideration of the act. Because if English built, (which is the case of the ship now in question) the increase of shipping would have been answered to the kingdom, our own timber would have been used, our workmen employed, and we should have had the benefit of the rigging and furniture; whereas, if she had been French built, she would have been duly qualified to have imported those goods, and we should have lost the benefit of the timber, labour, and equipping her with rigging and furniture. This seems to be very specious and plausible at first appearance, but is founded upon a supposition that we could have prohibited the importation of European goods in foreign bottoms: but as that could not be done with security to our trade, for the reasons I have mentioned, the force of this argument will soon vanish; the parliament therefore planned the act upon the considerations mentioned by Mr. Solicitor. Several countries, as France, Spain, and Italy, can more easily buy ships than they can build them. Other countries, as Russia, &c. had timber and materials enough for building ships, but wanted sailors.

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Therefore, the parliament prohibited the importation of goods of the growth of any European country, unless in ships owned and navigated by the English, or in ships of the built of, and manned by sailors of that country of which the goods were the growth. The consequence was, that foreigners could not make use of the ships they bought, though the English might, which must frequently force them to have recourse to our shipping; and so the general intent of the act, to secure the carriage to the English, was answered as far as it possibly could be: whereas, if foreign property had been sufficient to qualify ships, foreigners might have bought ships where they pleased, and manned them with their own sailors, and then not only the freight, but the employment of our sailors, would have been lost to England; and this will greatly overbalance any advantage that could accrue to England from the building and equipping ships for foreign use. But besides, a statute ought never to be so expounded as to have the secondary intent defeat the primary intent of it."

Judgment was accordingly given for plaintiff, and the ship deemed forfeited.

Of the country or place where a ship is built.

Several difficulties likewise arose with respect to the country or place where a foreign ship was built, whether it was to be taken geographically, or depended upon the sovereignty; for example, if one of the Hanse towns came into the possession of Prussia or Russia, whether a vessel built in such town became a Prussian or Russian vessel, or continued as formerly only a Hanse ship. In order to remove all difficulties of this kind, the stat. 22 Geo. III. c. 78. was passed, in which it was enacted, that any person may import into Great Britain any sort of timber, or certain other articles therein mentioned, from any foreign place in Europe, in a ship the *property* of subjects under the same sovereign as the country of which such goods are the growth, produce, or manufacture, although the country or place where such ship was built, or to which she belongs, was not under the dominion of such sovereign at the time of passing the act of navigation. This act, however, became so mischievous to our whole navigation system, that it was found necessary to correct it by another statute (27 Geo. III. c. 19.) passed for the purpose. It certainly effected too great an innovation upon our former navigation law, by enacting that the *property*, and not the *built* of the ship, should be regarded; and that the property should not be restricted to the place of production, but might be of the subjects of the same sovereign.

Of the country of the master and mariners.

Another difficulty arose in the same period, (*g*) with respect to the qualification required by the navigation acts, *that the master, and three-fourths of the mariners, should be of the country or place to which the ship belonged.* The question was, whether it was necessary that such master and mariners should be strictly citizens of such place, viz. by birth or naturalization. In the case of Scott *v.* Schwartz, (*h*) this question came before the Court of Exchequer on an information upon the seizure of a ship as forfeited *for a breach* of the navigation laws. This was the case of a ship, Russia built, from Riga, navigated by a master born out of the Russian dominions, but who had, seven years before, been admitted a burgher of Riga, and had ever since continued so, residing at Riga when not upon a voyage. The ship was also navigated by eleven mariners; four of Russian birth; a fifth born in Ireland, and bound apprentice to the master; the other six were born out of the dominions of Russia. It was insisted for the crown that the ship was forfeited by the stat. 12 Car. II., inasmuch as she was not manned as the act requires. But Chief Baron Comyn was of opinion, that this ship was navigated within the meaning of the statute; that with respect to the master, though born out of the Russian dominions, he was a burgher of Riga, that he had taken the oath of allegiance to the Empress of Russia, which constituted him a subject

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(*g*) 1706, and 1712. Reeves, 188, 189. (*h*) Comyn's Rep. 696.

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of that sovereign, and that he might, therefore, within the meaning of the act, be denominated a man of that country. "The greater difficulty," he says, "will be in regard to four other of the mariners, one of whom is said to have resided at Riga eight years, another seven, another six, another only four years, before the seizure, and during these years to have sailed from Riga in this and other voyages. Now I am of opinion, that these are men of that country, within the intent of the act of navigation; 1st, because the act seems to intend by people of a country any that are *settled and fixed inhabitants there;* and when it mentions mariners of the said country or place, it still speaks more loosely and generally; and, consequently, a residence of four, six, or eight years, may well satisfy that expression. 2d, This seems to answer the design of the act, which was not to create difficulties in other countries to find *mariners* amongst themselves, but to prevent their supplying themselves with any mariners from other states but *English.* 3dly, Because, by the civil law, such a residence gives the country a right to their service. (*i*) 4thly, The special verdict does not find these persons had ever any residence or habitation, since they were grown up, in any place out of the dominions of Russia. It does not appear that they ever made any voyage from any other country whatsoever; so that they may be properly said to be the mariners of Russia. But there is no foundation to say that they were ever mariners of any other country or place. And it is not inconsiderable that the act of navigation requires only that foreign vessels be manned by a master, and three-fourths of the mariners which are of *the same country.* It does not say by mariners born in that country, or brought up there, but mariners of that country, which is a denomination they must acquire long after their birth, for they could not be born mariners; and if they are of that country whilst they

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(*i*) Qui originem ab urbe Româ habent, si alio loco domicilium constituerunt, munera ejus sustinere debent, Dig. l. 50. tit. 4. lex 3.

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are mariners, and never were mariners of any other country, it seems fully to satisfy the words and intent of the act. It was insisted that they ought to be subjects, at least, of the Empress of Russia. But if the laws of Russia are not contrary, in this respect, to our's, by their being resident there they owe a *local allegiance.* But it was urged, that by this construction the act might be eluded; foreigners might stay a day or two, and then man their vessels; for, if a residence of two or three years will suffice, why not for two or three weeks, or two or three days? Where will you stop? But there is no consequence of this kind can be drawn from what is said; for if that was specially found, it might alter the case; that would be an artifice or fraud to evade the act; but nothing of this nature is found, which in a penal act must be, or it cannot be intended. But, upon the whole, it would be almost impracticable, and make commerce very hazardous, if every merchant was to search out the nativity of every mariner he employed, and in case of mistake or misinformation was to forfeit his ship and cargo." The Court gave judgment for the defendant. (*k*)

Some difficulties have likewise arisen with respect to what should be regarded as an *importation.* (*l*) Thus a ship, laden with teas, was driven into Yarmouth harbour by stress of weather. It was here clearly held, that such compulsory entrance was not an *importation* against the navigation acts; that such importing indeed is not excepted by the express words of the act, but is to be understood to be excepted by that equity and humanity which is allowed in interpreting statutes. (*m*)

It has been observed that though the legislature has adhered with all possible rigour to the policy of maintaining

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(*k*) Comyn's Rep. 693.

(*l*) See *ante*, page 77, as to what is to be deemed an importation, and the cases there cited.

(*m*) Reeves, 197.

every part of the navigation law, circumstances have still arisen in which it has been found necessary to suspend or relax their strict application or interpretation. This has been done in every period of their history. Their first stage affords many examples. The difficulty of carrying on commerce in war has rendered it necessary to relax our navigation laws during the period of any active and extensive hostility.

Relaxation of the navigation laws, pending war.

The first proceeding of the kind is an order of council, dated March 6, 1664, by which the act of navigation is suspended, so far as regarded the import and export of Norway and the Baltic sea; and so far as respected Germany, Flanders, and France, provided the merchants and owners of the ships were natural born subjects. English merchants might likewise employ foreign ships in the coasting and plantation trade.

In the war of 1740, it was deemed necessary to recur to a similar policy, and stat. 17 Geo. II. c. 36, was passed with this purpose. By this it was enacted, that British built ships, purchased by foreign merchants, should enjoy the same privileges in these kingdoms as if they were of the built of the respective countries from whence they come; such ships, however, to pay alien and other duties, the same as if the ships were foreign built. This indulgence, however, was to continue only during the war. In 1756, and again in 1779, the same provisions were revived by stat. 29 Geo. II. c. 34., and stat. 19 Geo. III. c. 28.

Again, by stat. 19 Geo. III. c. 9., it was permitted to bring thrown silk of Italy from any port or place, and in any ship. And by stat. 20 Geo. III. c. 45, any member of the Turkey Company might import any Turkey or Levant goods in any ship belonging to any friendly state. The act was to continue in force during hostilities with France, Spain, and Holland.

With the same policy, and under the same necessity, were passed the five following statutes. These statutes are the 21 Geo. III. c. 19., for relaxing the act of navigation with respect to flax, or flax-seed. The same of cobalt and orchilla seed, by stat. 21 Geo. III. c. 62. ; and of wool, barilla, jesuits-bark, and linen-yarn, by stat. 23 Geo. III. c. 27. With respect to all sorts of corn, grain, meal and flour, by 23 Geo. III. c. 1. ; and stat. 23 Geo. III. c. 9., extended the same licence to the import of rice and Indian corn.

A clause in stat. 27 Geo. III. c. 19, and two clauses in 34 Geo. III. c. 68, are of more importance.

The clause in stat. 27 Geo. III. c. 19. was passed to correct the mischief which the navigation act was supposed to have suffered from a provision in stat. 22 Geo. III. c. 78., before cited, in favour of foreign shipping. By that act, foreign ships were allowed to import the articles enumerated in the eighth section of the act of navigation, if they were of the built, or belonged to any other country than that of their growth or production, provided it was a country under the same sovereign. To repeal this enactment in effect, but without an express declaration of such purpose, a clause was introduced in the 27 Geo. III. c. 19., by which it was provided, that the goods or commodities so enumerated or described in the act of navigation, being of the growth, production, or manufacture of Europe, *may* be imported into Great Britain, under the regulations of that act; (and by stat. 13 and 14 Car. II. c. 11., and stat. 6 Geo. I. c. 15.,) either in ships, which before 1st May, 1786, truly and without fraud wholly belonged to His Majesty's dominions, or which are the built of His Majesty's dominions, and registered according to law, or in ships the built of any country or place in Europe, belonging to, or under the dominion of the sovereign or state in Europe of which such goods or commodities are the growth, production, or manufacture, or of such ports where those goods can only be, or most usually are, first shipped for transportation, with a master and three-fourths at least of the mariners belonging to such country, place, or port, and in no other ships whatsoever.

By this act, the ships are required to be of a certain built, as by the act of navigation: but the built, instead of being of the *very* country of production, may be only of *some* country under the same sovereign; and this clause is so worded as to extend to countries not under the same sovereign at the time when the navigation act was passed. The construction, however, of this act is, that where British *built* ships are required by the eighth section of the navigation act, they must still be employed under this act. (*n*)

The 34 Geo. III. c. 68. still more materially affects British shipping in part of the import, and in the whole of the export, trade. All articles of European trade, not included in the eighth section of the act of navigation, being under no prohibition or restriction whatsoever by act of Parliament, might be imported in any ships, British or foreign, howsoever manned or navigated; but this act, by enacting that no ship, registered, or required to be registered as a British ship, shall import or export any articles whatsoever, unless navigated by a master and three-fourths at least of the mariners, British subjects, has put all imports in British ships under the same restrictions with those included in the eighth section of the navigation act, and has created a restriction as to export which before was unknown to the navigation system, except in the British colonies, where the export, as well as import, was required to be in British ships, manned and navigated in this manner. (*o*)

These statutes were followed by a series of acts, ren-

(*n*) Reeves, 340.

(*o*) Reeves, 341.

dered necessary by the war of 1793; but as they all originated in the circumstances of hostilities, and all expired with the termination of the war, it becomes unnecessary to examine and enumerate them.

Dutch Property Acts.

The most important of these acts, and which are chiefly worthy of notice, as a portion of their effects remains to the present day, and because their great but unexpected utility during the late hostilities will certainly occasion their re-enactment in future wars, are the 35 Geo. III. c. 15., being the first of a series of acts commonly called the *Dutch Property Acts*, and the 36 Geo. III. c. 76., called the neutral ship act. The object of both these acts was the same, viz. to afford an asylum to the goods and property of foreigners who wished to withdraw themselves and their effects from the French armies which were then entering their respective countries. In order to accomplish this purpose, the 35 Geo. III. c. 15. enacted, that all goods, wares, merchandize and effects whatsoever, coming directly from any of the ports of the United Provinces, to any of the ports of this kingdom, in the vessels of any country, and navigated in any manner, should be permitted, until further orders, to be landed and secured in warehouses under the joint locks of His Majesty and the proprietors, at the expense of the proprietors; there to remain in safe custody for the benefit of the proprietors, until due provision should be made by law to enable the proprietors to re-export, or otherwise dispose of them.

The effects of this statute were found to be so beneficial, and to attract such an immense portion of wealth and trade into the ports and docks of this kingdom, that the Parliament came to a resolution, not only to continue for a further time the policy relating to *Dutch ships*, but to enlarge it to all *neutral ships* whatsoever. Accordingly, the 36 Geo. III. c. 76. was passed, by which it was enacted, that all ships and vessels belonging to persons of any country in amity with His Majesty, which were in search of a place

Dutch Property Acts.

wherein to deposit their goods, wares and merchandize, might come into any of the ports of this kingdom, in the same manner as Dutch ships under the 35 Geo. III. c. 15., and enjoy the same benefit as to importation, warehousing, and exportation. These acts, which at first were passed only for a time, and were renewed by annual acts, were at length repealed by 42 Geo. III. c. 80., which substituted some other provisions for continuing this trade in neutral ships, in a manner less repugnant to the interests of British shipping, till hostilities should finally terminate, and the navigation system return as before the war. Upon the renewal of hostilities, in the year 1803, the 44 Geo. III. c. 30. was passed, by which the provisions of the 42 Geo. III. c. 80. were continued till eight months after the ratification of a definitive treaty of peace.

Neutral Ship Acts.

Instead of the large provisions of the Dutch property and the neutral ship acts, the two last statutes of which we have been speaking taking that middle course which certainly will become a precedent for any future war, enacted, that it should be lawful, under any order of council, with respect to Great Britain, and under any order of the Lord Lieutenant and council with respect to Ireland, to import, in any ship or vessel belonging to persons of any country in amity with His Majesty, not being of less than one hundred tons' burthen, and navigated in any manner whatsoever, or in any British-built ships, owned and navigated according to law, from any territory, possession or country, not under the dominion of His Majesty, on the continent of America or in the West Indies, any goods or commodities whatsoever, the produce of any part of such territories, possessions, or countries, into any of the ports of Great Britain or Ireland. Goods so imported were to be warehoused under the joint locks of His Majesty and the proprietor, subject to the direction of the commissioners of the customs in England, Scotland, and Ireland respectively; and not to be removed but for re-exportation, on due entry being made, for foreign parts.

Neutral Ship Acts.

As what may be termed the war system of our navigation laws is contained in the above recited acts, and in another of the same period, the 43 Geo. III. c. 153., we shall conclude this part of our subject with a brief abstract of the latter. By the first section of this act, it is allowed to import *organized thrown silk* of Italy, from any place, in any neutral ship, notwithstanding stat. 2. Will. & Mary, c. 9., which requires it to be brought from the ports of the countries where it is produced, and to come directly by sea. There is an exception of certain coarse silk. The act then proceeds, secondly, to allow the importation of *flax* and *flax-seed*, in any neutral ships, notwithstanding the eighth section of the act of navigation, which requires them to be imported in British ships, or in ships of the country where those articles are produced, or ships of the port where they are first shipped for transportation. Thirdly, to allow any member of the Turkey Company to import goods from Turkey or Egypt, or from any part of the Grand Seignior's dominions within the Levant seas, in ships *belonging* to Great Britain or Ireland, or in any neutral ship, notwithstanding the third or eighth section of the act of navigation, which require such importations to be in British-*built* ships, or in ships of the country where those articles are produced, or of the port where they are first shipped for transportation. Fourthly, to allow the importation of goods usually imported from any place in Europe within the Streights of Gibraltar (not being goods which could heretofore be imported only from the Grand Seignior's dominions) from any place, in any neutral ship, notwithstanding the eighth section of the act of navigation, which requires some of those articles to be imported in British ships, or ships of the countries where they are produced, or of the port where they are first shipped for transportation. Fifthly, to allow the importation of *pitch*, *tar*, *deal boards*, *fir*, and *timber*, from any ports of Germany, in British-*built* ships, notwithstanding stat. 13 and 14 Car. II. c. 11. which prohibits any of those articles being imported from Germany;

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which prohibition had been taken off only as to timber, fir, and deal boards, the production of Germany, by stat. 6 Geo. I. c. 16. Sixthly, to allow the importation of Portugal *salt* from Portugal, in any neutral ships, notwithstanding the eighth section of the act of navigation, which requires it to come in British ships, or ships of the country where it is produced, or of the port where it is first shipped for transportation. Seventhly, to allow the importation into Great Britain of *wool*, and into Ireland of *barilla*, *Jesuits bark*, *linen yarn*, *hemp*, *indigo*, *cochineal*, *wool*, and *cotton wool*, from any place, in any neutral ship; which must be intended as a dispensation from the third, fourth, or eighth sections of the act of navigation, according as those articles are respectively the produce of Asia, Africa, America, or of Europe. Lastly, a power was vested in His Majesty, and in the Lord Lieutenant of Ireland, by order in council, from time to time to permit any such goods, wares and merchandize as shall be specified in any such order in council, to be imported from any port or place of any kingdom or state not in amity with His Majesty, in any neutral ships; and several orders of council that had been made since the renewal of hostilities, prior to that act, are thereby declared good in law. (*p*)

The last provision of 43 Geo. III. amounted to a dispensation from the navigation system in regard to countries with which we were at that time at war; and it was deemed proper to vest in His Majesty the same discretionary power with respect to foreign America and the West Indies. For this purpose the 42 Geo. III. c. 80. was revived and continued by 44 Geo. III. c. 30. The 42 Geo. III. declared it to be lawful, under any order of council, to import in any ship or vessel, belonging to any country in amity with His Majesty, (not being of less than one hundred tons' burthen, and navigated in any manner whatsoever, or in any British-*built* vessel, owned and navigated according to law) from any territory, posses-

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(*p*) Reeves, 354, 5, 6, &c.

sion, or country not under the dominion of His Majesty, on the continent of America or the West Indies, any goods or commodities whatsoever, the produce of any such countries, into any of the ports of Great Britain. The act then prescribed certain regulations for landing and warehousing such goods; and made an exception of tobacco, snuff, and rice.

Neutral Ship Acts.

It was by virtue of the above cited acts of Parliament, and the 45 Geo. III. c. 34, by which His Majesty was empowered to grant licences to his subjects, to import any goods and commodities in neutral ships from countries in America belonging to any foreign European sovereign or state, that the facilities which our commerce required in time of war were principally obtained. There is yet remaining another portion of our law of commercial intercourse during war, the omission of which would leave our subject imperfect; for although the condition of things in Europe, in which the late extensive system of licences originated, has passed away, most probably never to return; yet, as in some future war, circumstances may arise, requiring a partial application of the same system, it may not be useless to explain the principles, and to refer to the leading decisions upon which the practice of granting and interpreting licences was controlled and regulated.

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The navigation laws, being the statutes of the realm, could not of course be dispensed with by the prerogative of the Crown. But it had been found necessary on many occasions to have recourse to Parliament to suspend their operation in time of war. The several acts, therefore, were passed, to which we have before adverted, to alter or qualify them according to the new condition of things which was produced. By some of these acts, a special power was given to the King in Council, to modify or dispense with such provisions as might be found expedient in particular conjunctures. Under other statutes, licences were directed to be granted by an order in council, &c.: under

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others, the Secretaries of State, by an authority under the King's sign manual, and in pursuance of an order of council specially authorizing the grant, were empowered to act in the place of the sovereign. The principal acts were the 43 Geo. III. c. 153. s. 15., 45 Geo. III. c. 34., 46 Geo. III. c. 3., 47 Geo. III. c. 27., 48 Geo. III. c. 37., 48 Geo. III. c. 126. 49 Geo. III. c. 25., 49 Geo. III. c. 60. As the authority to grant these licences was derived from the whole legislature, the power under them was constantly restricted to the letter and reasonable intendment of the several acts, and could not be extended farther than the statutes themselves permitted.

Independently of this power of bestowing licences, by which the restrictions of the navigation law were removed, the Crown, by its prerogative, already possessed a power of granting privileges and dispensations, by which it receded from its own rights in a state of war. Upon these conjoint legal powers therefore, viz. the licences by statute, which were an enlargement of the powers of the Crown by acts of Parliament, and the licences by prerogative, which were of inherent right, was built a system sufficiently large to accommodate itself to Europe under the Milan and Berlin decrees. Being granted for commercial purposes, they were not deemed *strictissimi juris:* they were not construed so tenaciously as the grants of the Crown in ordinary to the subject. Their object was to disembarrass commerce from the restrictions which the enemy had thrown upon it. The Crown, in these licences, gave nothing but a more extensive liberty of trade and commerce; of importation and exportation. It no way diminished its own stock, whilst it consulted the interest of the public. Hence it became, though not indeed in the first instance, a practice of the Courts of Admiralty, and likewise of the Courts of common law (in which such licences came incidentally under their cognizance in questions of policies of insurance, freight, &c.) to interpret them liberally and largely, and with none of that

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jealous apprehension of the subject taking more than the Crown intended to give, by which royal grants had been fettered and controlled at common law.

It would be a want of due professional feeling, now that the subject presents itself, not to join the humble testimony of the writer of these pages (with the concurrent praise of all) to the profound and accurate learning of Sir William Scott, who, in the administration of this law, has shewn how the most liberal equity can be reconciled with the requisite certainty of law. He is in fact the author of the whole learning of the law relating to the system of licences. And if it be considered how suddenly and unexpectedly the circumstances arose, it must be matter of reasonable admiration, and of the most unqualified praise, that a connected set of principles, so consistent with law and the practice of the Courts, was as immediately invented to meet and embrace them. It must remind the common lawyer of the celebrated fiction of *uses*, so ingeniously invented and introduced by the clergy to evade the statutes of *mortmain*. The law of licensing, a term and title already known to the Admiralty Courts, was thus extended to comprehend a new and unexpected state of things. A certain nature, suitable principles, and rules, were given to it; and most ingeniously, and at the same time most learnedly, they were made to accommodate themselves to all the cases which could occur. Our limits enable us to give only a summary of the leading cases which have been decided upon this subject.

We have already observed, that the King, who is the arbiter of foreign commerce, may regulate it, except he be restrained by statutes; but he cannot change the law of the land, or the law of nations, by general and unlimited regulations.

He may give an enemy liberty to import; he may place a whole district, though the member of a hostile country,

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in a state of amity; he may exempt any individual from the operation of war.(*q*) But a licence to an enemy to import goods must be express, for an enemy will not be protected by a general licence. (*r*) In all cases, however, in which the king grants a licence, he may also qualify it, in which case the parties seeking to protect themselves under it must conform to its regulations. (*s*) In the case of the Cosmopolite, Sir William Scott says, " a licence is a high act of sovereignty: they are necessarily *stricti juris*, and must not be carried farther than the intention of the great authority which grants them may be supposed to extend. I do not say that they are to be construed with pedantic accuracy, or that every small deviation shall vitiate the fair effect of them." (*t*) Again that learned Judge observes, " the shipper obtains a licence, which is a thing *stricti juris*, to be obtained by a fair and candid representation, and to be fairly pursued. (*u*) In the case of the Cosmopolite Sir William Scott proceeds to lay down certain rules for the construction of licences, which are most fit to be remembered. " Two circumstances," he says, " are required to give due effect to a licence: 1st, that the intention of the grantor shall be pursued; 2d, that there shall be an entire *bona fides* on the part of the user. It has been contended that the latter alone should be sufficient, and that a construction of the grant merely erroneous should not prejudice. This is, I think, laid down too loosely. It seems absolutely essential that *that* only shall be done, which the grantor intended to permit: whatever he did not mean to permit is absolutely interdicted; and the party who uses the licence engages not only for fair intention, but for an accurate interpretation and execution. I do not mean to exclude such a latitude as may be supposed to conform to the intentions of the grantor literally understood."

(*q*) 1 Acton, 313.

(*r*) Id. ib.

(*s*) 1 East. 475.

(*t*) 4 Rob. 11.

(*u*) 4 Rob. 96.

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In the early cases upon licences in the common law courts, the inclination of the Judges was in favour of a liberal construction of them. Thus in Defflis *v.* Parry, (*v*) where a licence was obtained by A. to import from an enemy's country, in six ships, such goods as should be specified in his bill of lading, and goods were imported on board one of the six ships on account of B., C., and D., to whom several bills of lading were sent for their respective goods, and one general bill of lading for the whole cargo was sent to A.; the Court of Common Pleas held the whole cargo to be protected. In this case Lord Alvanley observed, "We are not to construe the acts of government strictly against the merchant. If it had been intended that the licence should have been more confined, I think it would have been expressed." But in the case of the Jonge Johannes, which was a case precisely similar, (*w*) Sir William Scott decided in direct opposition to the judgment of the Common Pleas, holding, that when a licence is granted to one person it cannot be extended to the protection of all other persons who may be permitted by that person to take advantage of it. "The great principle," he says, "in these cases is, that subjects are not to trade with the enemy without the special permission of the government; and a material object of controul which Government exercises over such trade is, that it may judge of the particular persons who are fit to be entrusted with an exemption from the ordinary restrictions of a state of war." (*x*)

In some subsequent cases, however, the courts of common law adopted a different construction. Thus, where a licence was granted to A., on behalf of himself and other British merchants, to export goods to certain places within the influence of the enemy, which places were interdicted to British commerce, it was held sufficient to legalize an

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(*v*) 3 Bos. & Pull. 3.

(*w*) 4 Rob. 263.

(*x*) See likewise the case of The Aurora, 4 Rob. 218.

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insurance upon such adventure, if it appeared that A. was the agent employed for the British merchants really interested in it, to get the licence, though he had no property in the goods himself. (*y*) Where a licence was granted to A. of Birmingham, for the importation of certain goods from Holland into this country, Sir William Scott decided that such licence would not protect a shipment made by A. in Holland in person, and under papers describing the firm of his house as A. and Co. of Amsterdam. (*z*) So a general licence is to be construed strictly, and will not extend to the protection of enemy's property. (*a*) But a licence, particularly specifying *any flag*, protects even enemy's property; (*b*) so where a licence was granted to a British merchant by name, on behalf of himself and others, to export to Petersburgh, and import a cargo thence, it was held, that an alien enemy might lawfully be interested in the export cargo, as well as in the import cargo. (*c*) The decision in that case turned upon the general words of the licence, which was to the grantee by name, on behalf of himself and *others*. The object was to facilitate the export of British goods, to effect which the goods must necessarily be consigned to foreigners. A different construction would obviously have counteracted the commercial purposes for which the licence was granted. So it has been holden that a licence to J. H. of London, merchant, on behalf of himself and other British merchants, to import a cargo from certain limits, within which an enemy's port was situate, in any vessel bearing any flag *except* the French, would protect a ship trading from that port in a ship in which J. H. and an alien enemy were jointly interested. (*d*) The Court thought that the true

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(*y*) Rawlinson *v.* Janson, 12 East. 223. *But see* Barlow *v.* M'Intosh, 12 East. 311.

(*z*) Jonge *v.* Kassina, 5 Rob. 297.

(*a*) Josephine, 1 Acton, 313.

(*b*) 1 Acton, 332.

(*c*) Feize *v.* Bell, 4 Taunt. 4.

(*d*) Hagedorn *v.* Reid, 1 Maule & Selw. 567. Sed *vide* Hagedorn *v.* Bazett, 2 Maule & Selw. 100. Mennett *v.* Bonham, 15 East. 477.

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construction of that licence was to protect a trade in any ship except one bearing the French flag. A licence to "sail under any flag except the French" was held to exclude French ownership.(*e*) But a similar licence was held to protect the property of persons in countries unexpectedly annexed to France, whilst engaged in British commerce. (*f*) But a vessel carrying a cargo to the ports of the enemy, under a licence to proceed thither in ballast, for the purpose of bringing a cargo to this country, was held not to be protected,(*g*) though a licence to import a cargo into this country was deemed sufficient to protect a vessel proceeding in ballast to the port of shipment for that purpose.(*h*) Whenever a licence is granted on a condition, that condition must be truly and faithfully performed.(*i*) Thus in the case of the Europa, where the condition of the licence was for the vessel to touch at Leith, and it was not complied with, Sir William Scott condemned the vessel.(*j*) And the sentence was affirmed on appeal. It is a violation of a licence to touch at an interdicted port, under a licence for a direct voyage to this country. The presumption being, that at the intermediate port the vessel might receive another destination, or might actually deliver her cargo in that port.(*k*) *Secus,* if it be not known to be such at the time of sailing.(*l*) The words in a licence, "to whomsoever the property may appear to belong," have been held to protect the property of an enemy.(*m*) A licence to sail under any flag except the French was not deemed to be vitiated by the owner becom-

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Flindt *v.* Crokatt, *ibid.* 552. Fenton *v.* Pearson, 419. Parkin *v.* Dick, 11 East. 502. and the cases referred to in the argument in 2 Maule and Selw. 104.

(*e*) Edw. Adm. Cases, 44.

(*f*) Edw. 45.

(*g*) Edw. 11.

(*h*) Edw. 34.

(*i*) Vandyck *v.* Whitmore, 1 East. 486. See likewise a note of Gordon *v.* Vaughan, annexed to the case of Shiffner *v.* Gordon. 12 East. 302.

(*j*) Edw. 32.

(*k*) Edw. 42.

(*l*) Edw. 40.

(*m*) Edw. 20.

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ing a French subject during the course of the transaction.(*n*) So, in a case where permission has been given by a licence to export a cargo, the original licence is sufficient to protect the ship and cargo, not only *eundo*, but *redeundo*, where the original purpose has been defeated by the elements, or the arts of the enemy.(*o*) But a licence granted subsequently to the date of the capture was held to be no protection.(*p*) In this case Sir William Scott observed, "a licence is in its very nature prospective, pointing to something which has not yet been done, and cannot be done at all without such permission. Where the act has already been done, and requires to be upheld, it must be by an express confirmation of the act itself, as by an indemnity granted to the party; but a licence necessarily looks to that which remains to be done, and can extend its influence only to future operations." But a licence to import a cargo in one vessel was held to protect the importation of the same cargo in two vessels; and from a different port, it being shewn that it was impossible to make the shipment at the port specified in the licence;(*q*) but a licence to proceed to an enemy's port in ballast, for the purpose of bringing a cargo to this country, was held not to be a protection for a vessel carrying a cargo to the port of shipment.(*r*) In cases in which the parties have used due diligence, but have been prevented by accidents not within their controul from carrying their intentions into effect within the time, it has been holden that, though their licences have expired, they are entitled to protection.(*s*) With respect to expired licences, certain rules have been laid down in the *Admiralty Courts* which the

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(*n*) Edw. 45.

(*o*) Case of the Jonge Frederick, May 10, 1810.

(*p*) Case of the St. Ivan Wacklin, Nov. 12, 1811.

(*q*) Edw. 349.

(*r*) Edw. 365.; and see *ante*, Edw. 11.

(*s*) Case of the Goede Hope, Edw. This case is most important on account of the masterly judgment of Sir William Scott, who therein discusses the rules of interpretation to be applied to licences generally.

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courts of law have followed. A vessel proceeding in ballast, under a licence which had expired several months, to the port of shipment in the Baltic, for the purpose of bringing a cargo to this country; but having an indorsement, setting forth the fact of a new licence which had been actually obtained though not on board, and which could be applied to that vessel on her arrival at the port of shipment, was held to be protected, under consideration of local circumstances and the situation of the countries in which such licences were to be carried into effect, the length of the voyage, &c. forming a ground for the Court to exercise an equitable discretion. (*t*) So, where a licence expired in consequence of an embargo in the enemy's port. On proof of the identity of the transaction, and no fraud appearing, it was held to be a subsisting licence, and a sufficient justification for not loading the cargo within the time specified; and this, notwithstanding the government had ceased to grant such licences. (*u*) Where a party has used his best endeavours to fulfil his engagements under a licence, and has only been prevented by the violence of the enemy from completing the voyage within the prescribed time, the Court has decreed restitution, even though the government may have refused to renew the licence. (*v*) So, a licence is not abortive when the cargo, upon damage discovered, was unloaded, and a second cargo of the same identical nature with the first, and corresponding in substance and quality, was substituted. (*x*) But, where the date has been altered, it is a mere nullity; for the Court, for the sake of guarding against fraudulent acts, will always adhere to the general rule, that the party claiming the benefit of a licence, must shew an unimpeached licence. (*y*) Where there has been a delay, but accounted for, and the ship has in fact fulfilled her engagements by delivery of the cargo at the port of destination, no capture

(*t*) Edw. 339.

(*u*) Edw. 354.

(*v*) Dod. 300.

(*x*) Dod. 306.

(*y*) Dod. 308.

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can be made, though the licence has expired; and the captors of a ship so circumstanced have been refused their expences.(z) We have already observed, that in the use and application of licences, it has not been the practice of the Courts of Admiralty, or of the courts of common law, to limit the parties to a literal construction. It has been deemed sufficient for them to shew that, under the difficulties of commerce, they have come as near as possible to the terms. Where there is no bad faith, or undue extension of the letter of them beyond the meaning of the Council Board, any little informalities or trifling deviations are disregarded. But where licences are conditional, they are restrictive within the terms of the condition. The condition is the law of them: therefore, if the condition of a licence be to touch at a particular place for convoy, if it be not complied with, the licence is invalidated, unless the non-performance of the condition be occasioned by stress of weather, or insurmountable obstacles. The only excuse for a departure from the condition of a licence is, irresistible necessity. When, therefore, a party is not within the terms of a licence, the character of an enemy revives; and the ship becomes, as such, liable to condemnation. And a licence to import into one part of the United Kingdom has been held not to protect an importation into another.(a) So, likewise, a vessel, coming under a licence for a direct voyage to this country, has not been allowed, by analogy to the rules of blockade, to touch at an interdicted port, unless permission was given.(b) Where the terms are departed from in any essential points, the courts have considered themselves not to possess the power of relief. Therefore, a licence obtained subsequently to the time of capture, is no protection. For, it is incumbent on a party making claim, to shew that he was at the time furnished with a protection. To give protection, the existence of the licence must be presumed. A licence, as we have before

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(z) Dod. 316.

(a) Edw. 358, and Dod. 257.

(b) Edw. 367, 369.

Licensing System.

observed, does not act retrospectively, and cannot take away an interest which is vested, in point of law, in the captors; where, therefore, it was not granted until after actual capture, (though by the course, or some irregularity in the Council Office, it bore date previous thereto,) it has been deemed to be no protection. (*c*) Under a licence for a direct voyage to England, a circuitous course, unless in a case above suspicion, and of manifest fair dealing, is not protected. So it has always been considered that licences are granted on a prospect of commercial advantage. Thus, the permission to go from one port of the enemy to another, requires that the vessel shall be going thither for the purposes of British trade, or a trade immediately connected with Britain. Therefore, a vessel proceeding under a licence to the enemy's port, for the purpose of being sold, is not protected by a licence to trade. (*d*) The Courts of Admiralty, as well as common law, have always considered it their paramount duty to guard against a fraudulent application of licences, where there is a total and essential departure from the terms, condition, or reasonable intendment of the licence. Fraud, where it is insinuated, is always investigated; and, if proved, is fatal: and where the departure is to a considerable extent, and the fraud affects the *whole* cargo, though in different degrees, the Court will pronounce against the whole: (*e*) And even in cases where the Court wish to apply the most favourable construction to licences, it possesses the mere power of interpretation. It can only assume the privilege of extension by favourable interpretation, where there is a total absence of *mala fides*. Therefore, a fraudulent application of a licence for a neutral vessel to extricate an enemy's vessel is a ground of condemnation; though the interests of persons, not parties to the fraud, will not be affected thereby. (*f*) The Court, for the most part, consider the plea of compulsion as inadmissible. The vio-

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(*c*) Dod. 160.

(*d*) Edw. 344.

(*e*) Dod. 173.

(*f*) Dod. 183.

lence, therefore, of a hostile government does not privilege persons to act in a contravention of the essential terms of a British licence. The party, under such circumstances, must look for indemnification to the quarter from which he has received the injury. (*g*) Such is the licensing system, which we have been induced to examine at length, and to cite the principal cases, as in its present form it constitutes a code which will hereafter become the law of our commercial intercourse during war. A treatise on the law of navigation would have been imperfect without it.

Present state of the European trade.

With the exception of the alterations made by the legislature under the circumstances of the late war and the acts for the registry of British vessels, the European trade remains to the present day almost the same as under the original navigation act of Charles II. The war acts terminated with the general peace, or, (as in some cases specially provided for the sake of due notice to the merchants in remote parts,) in six months after the signature of the treaties. The European trade, therefore, remains nearly what it was before the war, with some exceptions in favour of our fisheries, and some few additions by the treaties of peace with the European powers.

A short recapitulation of the state of our trade with those powers will be here necessary, though it must occasion some slight repetition.

Russia.

By the late treaty of peace, (*h*) the relations of amity and commerce between Russia and England are established upon the footing of the most favoured nations. (*i*) The trade between Great Britain and Russia is confined to the Russia Company, or fellowship, established by the 10 and 11 Will. III. c. 6., the privileges of which we have before

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(*g*) Dod. 242.

(*h*) July 6, 1812.

(*i*) A commercial treaty formerly subsisted between Great Britain and Russia, which expired in 1807.

pointed out. But as the sum of five pounds will entitle any British subject to the freedom of this fellowship, it can scarcely be deemed an impediment to general trade. By the 21 Geo. III. c. 62., drugs of the production or manufacture of any part of the dominions of Russia, laden and shipped at any port under the sovereignty of Russia, may be imported in British *built* shipping into this kingdom, and shall be deemed to be imported *directly* from the place of their growth. The 14 Geo. II. c. 36., prescribes certain regulations to which the Russia Company are required to conform in the importation of goods from Persia; and the 23 Geo. II. c. 34. makes it lawful for the Company to import from the dominions of Russia raw silk of the growth and produce of Persia, provided it be purchased by barter with woollen or other manufactures, or goods exported from Great Britain to Russia, (although the same be not carried from thence into Persia) or with the produce arising from the sale of such exported British manufactures. Both these acts save to the East India Company their privileges and exclusive rights of trade.

Sweden.

By the treaty with Sweden, (*k*) the relations of friendship and commerce between Great Britain and that kingdom are re-established on the footing whereon they stood on the 1st of Jan. 1791; and all treaties and conventions subsisting between the two states at that epoch are to be regarded as renewed and confirmed by the late treaty. The trade with this country stands upon the common regulations of the navigation laws; but by the 25 Car. II. c. 7. it is provided that every person, native or foreigner, may have free liberty to trade into and from Sweden, Denmark, and Norway, notwithstanding the charter to the Eastland Company.

Denmark.

By the treaty with Denmark, (*l*) it is agreed between the contracting parties by the seventh article, that the

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(*k*) July, 1812.

(*l*) January 7, 1814.

commercial relations between the subjects of the respective countries shall again return to their ancient state, and the sovereigns reciprocally agree to adopt measures for giving them greater force and effect. The twelfth article of this treaty stipulates for the subjects of Great Britain the privilege of a *depot*, in the port of Stralsund, of all articles of the growth or manufacture of Great Britain or her colonies, on paying a duty of one *per cent. ad valorem.* And all the ancient treaties of peace and commerce are to be taken as renewed between Great Britain and Denmark, so far as they are not contradictory to the stipulations of the treaty of 1814.

Netherlands.

The treaty with the king of the Netherlands (*m*) contains no stipulation with regard to European commerce; but the fourth article guarantees to the subjects of the Netherlands the same facilities of commerce and security of persons and property within the British territories in India, which are granted to the most favoured nation.

France.

The like facilities, privileges, and protection, are guaranteed to the subjects of France by the twelfth article of the late treaty.(*n*) And by the convention made in the following year, the king of France engages to farm to the British government the exclusive right to purchase at a fair and equitable price salt on the coast of Coromandel and Orixa. But, with the exception of the articles relating to the slave trade, there are none which affect the present state of the trade between the two countries, or the interests of commerce in general.

Spain.

In the treaty with Spain (*o*) the following articles, though not exclusively referring to European trade, are deserving of notice. In the event of the commerce of the Spanish American possessions being opened to foreign nations, his

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(*m*) August, 1814.

(*n*) May, 1814.

(*o*) July, 1814.

Catholic Majesty promises that Great Britain shall trade with those possessions on the footing of the most favoured nation. And, pending the negotiation of a new treaty of commerce, it is stipulated that Great Britain shall be admitted to trade with Spain upon the same conditions as those which existed previously to 1796; and all the treaties of commerce which subsisted at that period between the two nations, are ratified and confirmed by the late treaty. (*p*)

Portugal.

In the treaty with Portugal, (Feb. 1810,) it was deemed advisable, in favour of that country, to relax several important provisions of the navigation act. By the emigration of her sovereign to the Brazils, Portugal had formed a new seat of empire; and ancient relations of friendship, no less than commercial prudence, suggested the propriety of admitting her to trade with Great Britain upon the footing of the most favoured nation. Accordingly, the 51 Geo. III. c. 47. which was passed to carry into effect the treaty of commerce above referred to, repeals, in favour of Portugal, some important provisions of the navigation act. By the second section of this act, *any* goods of the growth, production, or manufacture, of *any* of the territories or dominions of the crown of Portugal, (this of course includes her American, as well as her European possessions,) are allowed to be imported direct from any such territories or dominions, in any ship or vessel built in any of the territories or dominions of the crown of Portugal. (*q*) By the fourth section, elephants' teeth and ivory are allowed to be imported from any of the territories of Portugal in British or Portuguese ships, respectively, though such elephants' teeth or ivory may not be of the growth or production of any of the Portuguese dominions. By the sixth section, tobacco, pitch, tar, turpentine, hemp, flax, masts,

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(*p*) By a decree of the king of Spain, of March 1818, Cadiz, Alicante, Corunna, and Santander, are established as ports of deposit for all goods permitted to be imported into Spain.

(*q*) See *ante*, page 103, and 140—142.

yards, bowsprits, staves, heading boards, timber, shingles, lumber of any sort, and articles of provision and food, being of the growth and production of any of the territories and dominions of Portugal in South America, are allowed to be imported direct into any of the West India islands, notwithstanding the 28 Geo. III. c. 6., and 31 Geo. III. c. 38. (*r*) It is here impossible to omit a slight mention of the famous Methuen treaty; for, though not exactly within the navigation laws, it affords a singular example of the whole commercial intercourse of two nations being comprehended within a compass scarcely exceeding a mercantile bill of exchange.

Methuen Treaty.

In the year 1703, this treaty was concluded by a gentleman of the name of Methuen, with Peter king of Portugal. It contains the following articles:—1st, The king of Portugal, on his part, stipulates, for himself and his successors, to admit for ever hereafter into Portugal the woollen cloths, and the rest of the woollen manufactures of the Britons, as was accustomed till they were prohibited by the laws; nevertheless, upon this condition,—2d, That her royal Majesty of Great Britain shall, in her own name, and that of her successors, be obliged for ever hereafter to admit the wines of the growth of Portugal into Britain; so that at no time, whether there shall be peace or war between the kingdoms of Britain and France, any thing more shall be demanded for these wines, by the name of custom or duty, or by whatsoever other title, directly or indirectly, whether they shall be imported into Great Britain, in pipes, or hogsheads, or other casks, than what shall be demanded for the like quantity or measure of French wines, deducting or abating one-third part of the custom or duty. But if at any time this deduction or abatement of customs, which is to be made as aforesaid, shall in any manner be attempted and prejudiced, it shall be just and lawful for his sacred Majesty of Portugal again to prohibit the

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(*r*) See Chapter II., on the Colonial Trade, passim.

woollen cloths, and the rest of the British woollen manufactures.

Methuen Treaty.

By this treaty, says Mr. King, (the editor of the British Merchant,) (*s*) in his dedication to Sir Paul Methuen, the son of the minister who negociated it, "we gain a greater balance from Portugal than from any other country whatever. By it also we have increased our exports thither, from about 300,000*l.* yearly, to near 1,500,000*l.*

It was by no means the interest of Britain, during a war with France and Spain, to use the wines of those countries, which, doubtless, could have been imported by neutral ships; and as Portuguese red wines were therefore become in some sort the only kind we could then conveniently and reasonably purchase, this treaty was beneficial to both countries, especially as Portugal in return for our taking such quantities of her wines, has constantly consumed a greater quantity of our manufactures, so as to occasion a considerable yearly balance in our favour.

The British manufactures, moreover, by reason of this trade, found a more easy entrance into Spain, and were thence exported to South America, so that the Portuguese trade became, in fact, a greater vent for British manufactures than would have been acquired by the mere supply of the Portuguese market itself. The only proper object of all commercial treaties is to clear away impediments, and to remove obstructions to a market: but in no degree to force it. Almost every nation in Europe raises a great portion of its revenue by its customs on foreign importations, which charges are the main impediments to the interchange of their produce. The object of commercial treaties is either to remove, or to balance, these charges of the respective governments. It is absurd, therefore, to give in to an objection now so frequent with

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(*s*) Macpherson, Vol. II. p. 729.

many popular writers, that all commercial treaties are contrary to the established principle of the liberty of commerce. The very effect of such treaties is, in fact, to restore this liberty. The objection would be good if their purport were to force a demand and consumption of articles not called for by the taste or necessities of foreigners. But so long as their object is merely to remove obstructions, in what respect can they be justly called restrictions on the liberty of commerce?

Sicily and Sardinia.

The treaty with the King of Sardinia contains no article with respect to their European trade. But in the treaty of commerce and navigation between England and the King of the two Sicilies, (September 1816) there are some articles of importance. By the first article his Britannic Majesty consents, that all the privileges and exemptions which his subjects, their commerce and shipping, have enjoyed, in the dominions, ports, and domains of His Sicilian Majesty, in virtue of the treaty of peace and commerce concluded at Madrid, in 1667, between Great Britain and Spain; of the treaties of commerce between the same powers, signed at Utrecht in 1713, and at Madrid in 1715; and of the convention concluded at Utrecht, 1713, between Great Britain and Sicily, shall be abolished. By the fourth article, British commerce in general, and the British subjects who carry it on, are to be placed upon the same footing as the most favoured nation, not only with respect to the persons and property of British subjects, but also with regard to every species of article in which they may trade. (*l*)

Ionian Islands.

By the late treaty beween Great Britain and Russia, signed at Paris, (Nov. 1815) the islands of Corfu, Cephalonia, Zante, Maura, Ithaca, Cerigo, and Paxo, with their dependencies, are constituted a single, free, and in-

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(*l*) This treaty contains some clauses with respect to the reduction of duties, which are not within the scope of this work.

dependent state, under the denomination of the United States of the Ionian Islands. Their trading flag is to be acknowledged by all the contracting parties, as the flag of a free and independent state. The commerce between the United Ionian States and His Imperial and Royal Apostolic Majesty is to be placed upon the same footing as the commerce between Great Britain and these islands. (*u*)

Turkey.

There has been no treaty of commerce or navigation with Turkey; and this trade remains with the Turkey Company, of which we have already spoken. (*x*) The navigation act directs, as we have before shewn, that no currants or commodities of the growth, production or manufacture of any of the territories to the Othoman or Turkish empire belonging, shall be imported into England or Ireland, in any vessel but which is of English-*built*, and duly navigated, and in no other, except only such foreign vessels as are of the built of that country or place of which the said goods are the growth, production or manufacture, s. 8. The places reserved to the Turkey Company, for their trade, are the States of the Republic of Venice, (in its Gulf) those of Ragusa, and all the Grand Seignior's dominions; the ports of the Levant and Mediterranean, excepting those of Carthagena, Alicant, Denia, Valencia, Barcelona, Marseilles, Toulon, Genoa, Leghorn, Civita Vecchia, Palermo, Messina, Malta, Majorca, Minorca, Corsica, and all other ports and places of commerce on the coasts of France, Spain and Italy; and the fine for those interloping in the trade, and not members of the Company, is a fine of twenty *per cent.* on the value of the cargo. (*y*)

Azores and Madeira.

We have already pointed out, in the chapter on the Colonial Trade, the commerce which is allowed to be car-

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(*u*) Similar treaties were signed on the same day by the plenipotentiaries of His Majesty, with those of the Emperor of Austria and the King of Prussia respectively.

(*x*) See *ante*, page 147.

(*y*) Beawes.

ried on between the Azores, or Western Islands, and the British colonies in North America, for the benefit of the fisheries. (*z*) In the same chapter we have dwelt upon the relaxation of the navigation laws, in favour of the trade between British America, the sugar colonies, and the ports south of Cape Finisterre. The direct trade between our colonies and Malta and Gibraltar is established upon the same principle; that of assisting our fisheries, and supplying our settlements with commodities by a less circuitous course. On account of the garrisons in the two last mentioned places, certain facilities have been allowed; and they are in some degree considered as depôts for those who deal with us for colonial articles in the Mediterranean.

Such is the European trade as it at present exists under the navigation laws, and the most recent treaties. For the sake of practice it may be condensed, and summarily represented in the three following Rules.

RULE I.

As to the Ships.

Russia and Turkey.

Enumerated articles.

No goods or commodities, being the growth, produce, or manufacture of Muscovy, or of any territories belonging to the Emperor of Russia; nor any sort of masts, timber, or boards, foreign salt, pitch, tar, rosin, hemp, flax, raisins, figs, prunes, olive oils, corn, or grain, sugar, potashes, wines, vinegar, or spirits called aqua vitæ, or brandy wine, (being the growth, product or manufacture of Europe) may be imported, but in British-*built* ships, *or* in British ships owned by British subjects, and navigated according to law, &c.: or in ships of the built of any country in Europe belonging to the sovereign of that

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(*z*) See *ante*, page 65, and Chap. II. *passim*.

Summary.

European country of which such goods are the product; or of the built of such port, where the said goods can only be, or most usually are, first shipped for transportation; and navigated by a master and three-fourths at least of the mariners of that country, place, or port. Currants and commodities, of the growth, &c. of the Turkish empire, are importable only in British-built ships, or in ships of the built of the country of which the goods are the produce; or of the usual ports of shipping them for transportation. This first rule is founded on the 12 Car. II. c. 18., amended by 27 Geo. III. c. 19. Thrown silk, of the growth or produce of Italy, Sicily, or the kingdom of Naples, is directed to be brought from some of the ports of those countries or places, whereof it is the growth or production, and to be imported by sea, and not otherwise. 2 W. & M. st. 1. c. 9. And thrown silk may now be imported from Malta directly into the United Kingdom, if it be of the production of Italy, Sicily, or Naples, on the payment of the like duties as are payable on thrown silk when imported directly by sea from the place of its production. The importation must be in British-built vessels, owned, navigated and registered according to law. 55 Geo. III. c. 29.

RULE II.

As to certain goods, from certain places.

No sort of wines, (other than Rhenish) no sort of spicery, grocery, tobacco, potashes, pitch, tar, salt, rosin, deal boards, fir timber, or olive oil, may be imported from the Netherlands or Germany, upon any pretence, in any sort of ships or vessels whatsoever. 13 and 14 Car. II. c. 11.

Exception 1.—Fir timber, fir planks, masts, and deal boards, the produce of Germany, which are importable from any place in

Summary.

Germany by British subjects, in British-built ships, legally navigated, 6 Geo. I. c. 15. Wine, the growth of Hungary, which may be imported from Hamburgh, 1 Anne, stat. 1. c. 11. And wines of Hungary, the Austrian dominions, or any part of Germany, which are importable from any place subject to the Emperor or House of Austria, in any such ships as are described in the first rule. 22 Geo. III. c. 78. and 27 Geo. III. c. 19.

Exception 2.—Fruit, wine, oil, cork, and salt, the produce of any part of Europe, south of Cape Finisterre, may be shipped in any place in such ports of Europe, for exportation direct to St. John's, in New Brunswick; St. John's, in Newfoundland; Quebec, in Canada; Sydney, in Breton island; Halifax and Shelburne, in Nova Scotia; and Charlotte Town, in Prince Edward island, on board any British ship legally navigated, which shall have arrived at such place in Europe, with articles of the growth or produce, or fish of the said colonies, taken and cured by his Majesty's subjects, carrying on the fisheries from any of the said colonies or plantations, or from any part of the United Kingdom, or with any of the goods or commodities (mentioned in 51 Geo. III. c. 97.) from the province of Canada, whether such goods and merchandise shall be the growth or produce of the province of Canada, or shall have been brought into the said province by land or inland navigation. The articles aforesaid, the produce of any part of Europe south of Cape Finisterre, shall, before the importation thereof into any of the several ports before enumerated, be subject to the payment of such duties as goods of the like denomination or description are subject to, upon being imported into any of the said several ports from Great Britain, and no other or higher duties.

RULE III.

As to articles unrestrained.

Bullion and prize goods, and all other goods and commodities of the growth, &c. of Europe, (not being prohibited absolutely to be imported, and not specified in the two preceding rules,) may be imported from any country or place, in any sort of ships, owned and navigated in any sort of manner. Summary.

The reasons of this rule are clear; the 12 Car. II. c. 18. s. 15. exempts bullion and prize goods; and as there are no statutes affecting the import of European articles, besides those mentioned in the two first rules, it follows that all others are commodities unrestrained. The restriction as to the navigation of British ships, imposed by 34 Geo. III. c. 68., which applies to all imports whatsoever, will be noticed under the head of the registry acts.

CHAPTER V.

THE COASTING TRADE.

THE next branch of our navigation laws is the coasting trade, in which it will be seen, that our navigation system is still more exclusive than even with respect to the colonies themselves.

The laws of our coasting trade are as simple and absolute as their object is distinct and decided. They are chiefly contained in the 6th sect. of the 12 Car. II. c. 12. the 1 James II. c. 18.; the 34 Geo. III. c. 68.; and the 42 Geo. III. c. 61.

In the sixth section of the navigation act it is enacted, "that no person shall load, or cause to be loaden, and carried in any bottoms, ships, or vessels whatsoever, whereof any stranger born (unless such as shall be denizens, or naturalized,) be owner, part owner, or master, and whereof three-fourths of the mariners, at least, shall not be English, any fish, victual, wares, goods, commodities, or things, of what kind or nature soever, from one port or creek of England, Ireland, Wales, the Islands of Guernsey, Jersey, or the town of Berwick, to another port or creek of the same, or of any of them, under pain of forfeiting the goods and ship; one moiety to the king, and the other moiety to the informer." The object of this provision was to exclude foreign property from the coasting trade.

The Coasting Trade.

The 1 Jac. II. c. 18. extended this prohibition from foreign property to foreign built ships, which, as may be seen, were not included in the above clause of the act of navigation. By the act of James II. every foreign built ship or vessel bought and brought into the kingdom, to be employed in our coasting trade, is to pay at the port of delivery five shillings per ton, over and above all other duties; one moiety to the chest of Chatham, and the other moiety to the Trinity Company.

By 34 Geo. III. c. 68. no goods, wares, or merchandize, shall be carried from any port, member, or creek, or place of Great Britain, or of the islands of Guernsey, Jersey, Alderney, Sark, or Man, to any other port, member, creek, or place of the same, or of any of them, in any ship or vessel; nor shall any ship or vessel be permitted to sail in ballast from one of the said ports or creeks to another, unless such ship or vessel shall, respectively, be wholly and solely manned with, and navigated by, a master and mariners, all British subjects.

The 42 Geo. III. c. 61. extends this provision to Irish ships.

With the exception of several acts passed to prevent smuggling, which do not fall within the plan of this work, all the regulations of our coasting trade are contained in the above statutes. (*a*)

(*a*) Masters of vessels, before they clear out coastwise, are required to give bond not to be concerned in any illegal transaction, 32 Geo. III. c. 50; and the owners are likewise required to give bond that the vessel be not illegally employed, nor out of the limits of her licence, 46 Geo. III. c. 137. and 56 Geo. III. c. 104. There are several acts of parliament regulating the licences which are required to be taken out by vessels exceeding a certain burthen: but these acts belong to the details of revenue and custom, rather than to a treatise on the general law.

The Coasting Trade.

The navigation law regards this trade to belong as peculiarly to British subjects, as the internal navigation of the country itself. Upon this principle the legislature confines it entirely to British ships, seamen, and capital.

The prohibitions upon this head are so simple and unqualified, that no cases have arisen out of the statutes.

CHAPTER VI.

THE FISHERIES—GREENLAND SEAS AND DAVIS'S STRAITS. —NEWFOUNDLAND FISHERY.—SOUTHERN WHALE FISHERY.—HERRING FISHERY.—BOUNTIES, &c.—CASES AND DECISIONS.—USAGES AND CUSTOMS.—RULES AND REGULATIONS, &c.

THE next branch of the navigation laws is the fisheries, which being peculiarly adapted to form British seamen to maritime experience and habits, have very early been distinguished by the active encouragement of the legislature.

It has been observed by some of our wisest statesmen, that our fisheries have not increased in the proportion of our commerce; and though our long line of coast, and the character of the population on our shores, appear peculiarly favourable to success and enterprize in that branch of industry, we have suffered other nations, and particularly the Dutch, to maintain a rivalship with us in our own waters, and to afford the principal supply of fish to the other kingdoms of Europe. But, within late years, this observation has ceased to be just. The Greenland and Southern whale fishery of Great Britain has long been without rivalry, and the circumstances of the late war have almost made it exclusively our own; whilst our herring fishery, under the encouragement of the legislature, has increased to an amazing extent. The method of curing herrings is now so perfect, and so familiar to the British seamen, that we not only supply the Catholic population of Europe with fish, in preference to all other countries, but we are also enabled to ship large cargoes to the East Indies and South America.

Encouragement of the Fisheries by the Navigation Act.

One of the principal enactments in the act of navigation of Charles II. is directed to this encouragement of British fisheries. The fifth section of 12 Car. II. enacts, that any sort of ling, stock-fish, pilchards, or any other kind of dried or salted fish, usually fished for, and caught by the people of England, Ireland, Wales, or the town of Berwick, or any sort of cod-fish, or herring, or any oil, or blubber, made of any kind of fish whatsoever, or any whalefins, or whalebones, which shall be imported into the British dominions, not having been caught in vessels truly and properly belonging thereunto, as proprietors and right owners thereof; and the said fish, cured, saved, and dried, and the oil and blubber (and such blubber to be accounted and paid as oil,) not made by the people thereof, imported into England, Ireland, or Wales, or the town of Berwick, shall pay double aliens' duty. This act was shortly followed by the 13 and 14 Car. II. c. 11, in which a duty, since called the *Mediterranean duty*, being imposed on under-sized ships trading into the Mediterranean, an exception was made in favour of ships, one moiety of whose full lading was fish only; and in such case the fish exported, and any goods and merchandize imported in the same ship for that voyage, were not to be subject to any other duty of tonnage or poundage for them than were theretofore accustomed. And by stat. 9 Geo. II. c. 33. that moiety must consist of fish taken and cured by His Majesty's subjects only.

For the encouragement of the North Sea island and Westmony fisheries, the 15 Car. 2. c. 7. was, amongst other objects, passed. In this statute it was enacted, that no fresh herrings, fresh cod, or haddock, coal-fish, or gull-fish, should be imported into England, Wales, or Berwick, but in English built ships, or in ships bonâ fide belonging to England, Wales, or Berwick, and having a certificate as required by that act, and whereof the master and three-fourths, at least, of the mariners are English; and which had been fished, caught, and taken, in such

Encouragement of the Fisheries by the Navigation Act.

ships, and so navigated, and not bought or had of any strangers born, or out of any strangers' bottoms, under pain of forfeiting the fish and the vessel. By the 18 Car. II. c. 2. made perpetual by 32 Car. II. c. 2. no ling, herring, cod, or pilchard, fresh or salted, dried or bloated, or any salmon, eels, or congers, taken by foreigners, aliens to this kingdom, are to be imported or exposed to sale in this kingdom, under pain of forfeiture.

The Greenland and Newfoundland fishery, a branch of navigation of more duration and of greater national benefits, secured the next encouragement of the legislature in the important statute, 25 Car. II. c. 7. It was herein enacted, that it should be lawful for all His Majesty's subjects, and for every other person of what nation soever, residing and inhabiting here, during the time of such their residence, freely to trade into and from Greenland and those seas, and there to take whales and all other sorts of fish, and to import into this kingdom all sorts of oil, blubber, and fins thereof, and to use and exercise all other trade to and from Greenland, and the parts adjacent of Newfoundland, and any other of His Majesty's colonies. And because it was necessary to encourage harpooners, it was permitted for a limited time to navigate with one moiety harpooners, and to have one moiety only of the rest of the mariners English; provided the Captain was English. The importation of fish foreign caught, and in foreign vessels, was at first rendered impossible, by duties amounting to a prohibition; and afterwards (by stat. 10 and 11 Will. III. c. 24.) was prohibited, under the forfeiture of ship and cargo. In the same sessions a similar act was passed for the encouragement of the fishery at Newfoundland.

These statutes allowing an importation of the produce of these fisheries without duty, a practice now arose of evading them by English smacks buying, when out at sea, fish caught by foreigners, and then bringing it to our ports

Encouragement of the Fisheries by the Navigation Act.

as British caught. To prevent this practice was passed the 1 Geo. I. c. 18. enacting, that no herring, cod, pilchards, salmon, or ling, fresh or salted, dried or bloated, nor any gril, mackerel, whiting, haddock, sprats, coal-fish, gull-fish, congers, nor any sort of flat fish, nor any sort of fresh fish whatsoever, shall be imported or exposed to sale in that part of this kingdom called England, which shall be taken by, bought of, or received from, any foreign or out of strangers' bottoms, under a penalty of 20*l.* (afterwards by 9 Geo. II. c. 33. made 100*l.*) on every person offending against the act. The penalties of 1 Geo. I. not to extend to eels, stock-fish, anchovies, sturgeon, and caveare. By the 10 and 11 Will. III. c. 24. an exception from these statutes was made in favour of lobsters and turbot, which are therein allowed to be bought, whether of British or foreign catching.

Fisheries encouraged by bounties.

In order to a further encouragement of the British fisheries, a system now commenced of allowing them an exemption from the salt duties, in the nature of a bounty, to be paid them by the collectors upon the exportation of fish, British caught and British imported. The principal act, for this purpose, was the 5 Geo. I. c. 18. which enumerates the species of fish caught in our seas, or in our northern fisheries, and commands the collector of the salt duties to pay bounties of so much per hundred or barrel, upon cod fish, ling, herrings, &c. when exported. This system of bounties was extended to the Greenland fishery by the 6 Geo. II. c. 33. which gave a bounty of 20*s.* (afterwards increased to 40*s.* by 22 Geo. II. c.45.) per ton upon all British ships of two hundred tons and upwards, *returning* from the fishery of the Greenland seas and Davis's Straits with their cargoes to a British port. This bounty was increased by several acts till the 11 Geo. III. c. 38. This act, which was to continue for fifteen years, enacted, that the bounty of 40*s.* should expire at the end of five years, and then be reduced to 30*s.* for the next five years, and afterwards to 20*s.* This act continued in force till

December, 1786. But the legislature, finding at the end of the first five years that the trade fell off with the depreciation of the bounty, the stat. 22 Geo. III. c. 19. restored the full bounty for five further years.

Fisheries encouraged by bounties.

These acts, which were only temporary, were consolidated in one important statute, which now constitutes in great part the law of the Greenland trade. This act is the 26th Geo. III. c. 41., further continued by 32 Geo. III. c. 22.; and 38 Geo. III. c. 35. (with other intermediate acts,) and, lastly, by 55 Geo. III. c. 39. By these several statutes, (until the 25th of March, 1820,) certain bounties are to be paid to British ships, owned by British subjects, usually residing in Great Britain, Guernsey, Jersey, or Man, which proceed from those places on the whale fishery to the *Greenland Seas* or *Davis's Straits*, or to the seas adjacent, manned and navigated with a master and three-fourths at least of the mariners British subjects, usually residing in Great Britain, Ireland, or Guernsey, Jersey, or Man. Such ship, after she has been visited and admeasured by the officer of the port, and it shall appear upon inspection and examination upon oath of certain persons, and be certified by such officer, that she is properly furnished with tackle and equipment for the whale fishery, according to the requisites of the act, and means to proceed thither, and endeavour to take whales, or other creatures living in the seas, and on no other design or view of profit in the voyage, and to import the whale-fins, oil, and blubber thereof into Great Britain, specifying the port, and shall give bond for so doing; upon these terms such ship may have a licence from the commissioners of the customs to proceed on such voyage; and upon the return of such ship, and her condition being reported by the officer of the port, and oath made by the master as to the performance of the voyage, and that all the whale-fins, oil, and blubber, imported, were really and *bonâ fide* caught and taken in those seas by the crew of such ship, or with the assistance of some other ship

Acts for the encouragement of the fisheries in the Greenland Seas and Davis's Straits, &c.

Bounties of 30s. per ton to ships in the Greenland trade.

licensed for that voyage, there is to be paid by the commisisoners of the customs a bounty of 30*s*. per ton of such ship. Such ship must sail on her voyage on or before the 10th of April, and continue in those seas diligently endeavouring to catch whales or other creatures, and not depart before the 10th of August, unless laden with a certain quantity of oil, blubber, or whale-fins, unless she shall be compelled by some unaccountable accident to depart. Ships of more than four hundred tons, already employed in the fishery, might continue to be rated as of four hundred tons, and not more. All ships coming into the fishery after the 25th of December, 1786, and being more than three hundred tons, shall not receive a bounty for more than three hundred tons; and such ships respectively are not to equip and man for more than four hundred or three hundred tons. If a log-book has not been constantly kept on board, no bounty will be allowed. The log-book must be produced to the Captains of His Majesty's ships of war with which they may chance to fall in, and also to the British consul at any foreign port. Provision is likewise made, that ships owned by the king's subjects residing in Ireland, and fitting out from thence, should, on complying with the conditions of this act, be entitled to these bounties. Permission is given to insure the bounties, in order that when ships were lost, the owners might have some indemnity. Harpooners, line-managers, and boat-steerers, are secured from impressment. The extent of the fishery is defined to fifty-nine degrees thirty minutes north, and no further. The commissioners of the customs are annually to lay before parliament an account of the ships employed.

Extent of Fishery defined.

Accounts to be laid before Parliament.

But it appearing not necessary to keep ships in the Greenland seas so long, it was enacted by stat. 29 Geo. III. c. 53. that they should have the bounty, although they left those seas before the 10th of August, and were not laden with the quantity of whale-fins and of oil and blubber required by stat. 26 Geo. III.

c. 41. provided they did not depart from thence till the expiration of sixteen weeks from the time of sailing from the port from whence they cleared out. These statutes and bounties were continued by several temporary statutes till the 55 Geo. III. c. 39. This act, in substance, repeats the 26 Geo. III. c. 41. and following statutes, as to the general regulations, and continues the bounties till the 25th of March, 1820. (*a*)

Bounties limited to March, 1820.

By stat. 39 and 40 Geo. III. c. 51. the Greenland trade was greatly assisted, by directing that the duty should be taken on the oil, and not on the blubber before it was boiled; in which circumstance the southern whalers, who always boil their blubber during the voyage, had before an advantage over the Greenland fishery. This easement has been continued in the new consolidation act, for laying duties, stat. 43 Geo. III. c. 68. The 46 Geo. III. c. 9. permitted vessels engaged in this trade until the signature of preliminary articles of peace, in consequence of hostilities with France, to complete their complement of men at any of the ports in the Frith of Clyde, or Lough Ryan, or at Lernick, in the isles of Shetland, or Kirkwall in the Orkneys. This act has been continued by the 55 Geo. III. c. 39. until the 25th of March, 1820.

Newfoundland Fishery.

This system of bounties was immediately afterwards extended to the Newfoundland fisheries; namely, to ships employed in the British fishery on the banks of Newfoundland, being British built, and owned by the king's subjects residing in Great Britain or Ireland, Guernsey, Jersey, or Man, of fifty tons or upwards, navigated with not less than fifteen men, three-fourths of whom were the king's subjects. They were to clear out from Great Britain; to catch not less than ten thousand fish on the banks, and land them on the southern or eastern side of Newfoundland, before the 15th of July; then return to

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(*a*) See Mr. Reeves's Observations on the earlier Acts, pag. 371 to 378.

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the banks, and come back again in like manner to the island with the same cargo, 15 Geo. III. c. 31. The same act extended similar bounties (for a like term of years now expired) for five ships employed in the whale fishery in the Gulf of St. Lawrence, on the coast of Labrador, or any seas to the southward of the Greenland seas and Davis's Straits. Such ships were to be British built, owned, and navigated; were to clear from Great Britain, Ireland, Guernsey, Jersey, or Man, and were to take one whale at least, and return in the same year to some port in England, with the oil so taken. The act then proceeded to extend the importation of train oil, duty free, (from English ships,) to ships belonging to Ireland, Guernsey, Jersey, and Man.

Bounties in this trade expired.

The bounties under this statute having expired, the 26 Geo. III. c. 26. (renewed from time to time by other statutes till 25 March, 1811,) was passed, by which another scale of bounties was given to ships British built, owned and navigated according to law, employed in the Newfoundland fisheries. The regulations to be the same with those required by stat. 10 and 11 Will. III. c. 25. But all these acts (as respects bounties,) having ceased in 1811, the present law of the Newfoundland trade is chiefly contained in the 15 Geo. III. c. 31. and in such clauses of regulation as remain yet unrepealed in some of the early acts herein mentioned. Under this act, and these unrepealed clauses, the present state of the Newfoundland fishery may be briefly stated as follows:—

Of the extent of the Newfoundland Fishery.

By the 10 and 11 Will. III. c. 25. all His Majesty's subjects, residing within Great Britain or Ireland, or the dominions thereunto belonging, trading to Newfoundland, and the seas, rivers, lakes, creeks, harbours, in or about Newfoundland, or any of the islands adjoining or adjacent thereunto, shall have, use, and enjoy the free trade and traffic, and art of merchandize and fishery, to and from Newfoundland, and peaceably use and enjoy the freedom of

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taking bait and fishing in any of the rivers, lakes, creeks, harbours, or roads, in or about Newfoundland and the said seas, or any of the islands adjacent thereunto, and liberty to go on shore on any part of Newfoundland, or any of the said islands, for the curing, salting, drying, and husbanding of their fish, and for making of oil, and to cut down wood and trees there for building and making or repairing of stages, ship-rooms, train-fats, hurdles, ships' boats, and other necessaries for themselves and their servants, seamen, and fishermen, and all other things which may be useful or advantageous to their fishing trade, as fully and freely as at any time heretofore hath been used or enjoyed there by any of the subjects of His Majesty, without any hindrance, interruption, or disturbance, from any person; and no alien or stranger, not residing within Great Britain or Ireland, shall at any time hereafter take any bait, or use any sort of trade or fishing in Newfoundland, or in any of the islands or places beforementioned. But the privilege of drying fish on the island of Newfoundland is not to be exercised by any of His Majesty's subjects arriving at Newfoundland from any other country except Great Britain or Ireland, or one of the British dominions in Europe.(*b*)

No person residing in, or carrying on the fishery in Newfoundland, shall sell or exchange any ship, vessel, or boat, or any tackle, apparel, or furniture, which may be used by any ship, vessel, or boat, or any seans, nets, or other implements or utensils for catching or curing fish, or any bait, or fish oil, blubber, seal-skins, peltry, fuel, wood, or timber, to or with any person except His Majesty's subjects.(*c*) And any person residing in, or carrying on the fishery in Newfoundland, who shall there purchase or take in exchange, or by way of barter, any goods from the subject of any foreign state, or assist in so doing, may be apprehended and committed

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(*b*) 15 Geo. III. c. 31. sect. 4. 29 Geo. III. c. 53. sect. 1.

(*c*) 26 Geo. III. c. 26. sect. 11.

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to prison, and shall forfeit double the value of the goods. (*d*) Vessels not exceeding thirty tons, and not having a deck, employed solely in the fishery on the banks or shores of Newfoundland, or in trading coastwise there, are not required to be registered. (*e*)

Relaxation of the Navigation Laws in favour of the Fisheries.

For the encouragement of this fishery, as we have before observed in our chapter on the colonial trade, it is made lawful to lade in British built ships, owned, navigated, and registered according to law, in any part of Europe, salt for the fisheries of Newfoundland; and to lade in the Madeiras and Azores, wines of the growth thereof, and export the same to any of the British colonies or plantations. (*f*) And oranges and lemons of the Azores or Madeiras may be laden at the said islands for exportation direct to any of the British colonies in North America, in British ships, navigated and registered according to law. (*g*) And any inhabitant of Guernsey or Jersey may transport direct from thence to Newfoundland, or any of the British colonies in America where the fishery is carried on, in any ships which may lawfully trade there, any sort of craft, food, victuals, clothing, or other goods fit and necessary for the fishery in those parts, or for the use of mariners or other persons employed on board the ships or on shore in carrying on the said fishery; such craft, &c. being the produce or manufacture of Great Britain, or the said islands, and such food or victuals, being the growth or produce of Great Britain, Ireland, or the said islands. (*h*) And any of His Majesty's subjects residing in the Isle of Man may export from thence, and import into any of the British colonies, in British ships, manned and navigated according to law, herrings caught and cured by them, in the same manner as victuals of and from Ireland may be imported into the said colonies, by 15 Car. II. c. 7. 12 Geo. III. c. 58. So, likewise, fruit,

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(*d*) 26 Geo. III. c. 26. sect. 16.

(*e*) 27 Geo. III. c. 19.

(*f*) 15 Car. II. c. 7. 4 Geo. III. c. 15.

(*g*) 57 Geo. III. c. 89.

(*h*) 9 Geo. III. c. 28.

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wine, oil, salt, or cork, the produce of Europe, south of Cape Finisterre, may be laden in any port of Europe for exportation direct to St. John's, in Newfoundland, on board any British ship, owned, navigated, and registered according to law, which shall have arrived at any such port of Europe with articles the produce of the British colonies in North America, or with fish taken and cured by His Majesty's subjects carrying on the fisheries from any of the British colonies in North America, or from any part of the United Kingdom. (*i*)

Before any blubber and train oil imported into Great Britain, as being taken and caught on the banks and shores of Newfoundland, and parts adjacent, wholly by His Majesty's subjects carrying on the fishery from that island, shall be admitted to entry, on payment of the duty payable on such oil, the master is required to deliver to the collector or other chief officer of the customs at the port of importation, a certificate under the hand and seal of the governor, or deputy governor of Newfoundland, or of the collector or other chief officer of the customs of the port or place in Newfoundland, where the oil or blubber shall have been taken on board; or if no such officer or governor or deputy governor shall be residing there, then a certificate shall be produced under the hand and seal of the naval officer or other principal officer of the said port or place, or of one of His Majesty's justices of the peace for the district, testifying that oath had been made before him (who is required to administer such oath, and to grant such certificate,) by the shipper of such blubber or oil, that the same was really and bonâ fide the produce of fish or creatures living in the sea, actually caught and taken wholly by His Majesty's subjects carrying on such fishery, and usually residing in the island of Newfoundland, or in his Majesty's European dominions. And the master of

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(*b*) See Chap. II. on the Colonial Trade, *passim*, and 51 Geo. III. c. 97.

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the ship in which the blubber or oil shall be imported, is required to make oath before such collector or other chief officer at the port of importation, that the blubber or oil so imported is the same as mentioned and referred to in the said certificate; and the importer or consignee of such blubber or oil is also to make oath before the collector or comptroller, or other proper officer of the customs, at the time of entry, that, to the best of his knowledge and belief, the blubber and oil so imported was actually caught and taken by British subjects, usually residing in Newfoundland, or in his Majesty's European dominions; and, on failure of such certificate being produced, and proof on oath being made, such blubber and oil shall be deemed to be of foreign fishing, and charged with duty accordingly, 55 Geo. III. c. 135. By the 49 Geo. III. c. 27. certain parts of the coast of Labrador are annexed to the government of Newfoundland.

Southern Whale Fishery.

The Southern Whale Fishery was first recognized, if not established, by 16 Geo. III. c. 47. the preamble of this statute stating, that "a valuable whale fishery had been lately discovered in the seas to the southward of the latitude of 44 degrees north." The same system of bounties was extended to this fishery by 26 Geo. III. c. 50., 28 Geo. III. c. 20., and 29 Geo. III. c. 53. These acts were all repealed by 35 Geo. III. c. 92. and another form of the trade established, and which, with some slight additions from subsequent statutes, chiefly enlarging the limits, continues to the present day to be the law of this fishery. In giving the substance of this act, we shall either interpose or subjoin these additions, and the acts by which they are made.

Premiums and bounties in the Southern Whale Fishery.

By the 35 Geo. III. c. 92, continued by the 51 Geo. III. c. 34., and 55 Geo. III. c. 45. the following premiums are to be given:—To each of eight ships, cleared out between the 1st of January and 31st of December, 1815, and between the 1st of January and 31st of December, in

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each of the four succeeding years, and which shall carry on the said fishery, *to the southward of the equator*, and return before the 1st of December, in the year subsequent to that of clearing out, with the greatest quantity of oil or head matter (not less than twenty tons in each ship,) *three hundred* pounds. To each of four other ships, cleared out between the 1st of January and 31st of December, 1815, and between the 1st of January and 31st of December, in each of the four succeeding years, and which shall proceed to the southward of the 36th degree of south latitude, there to fish, and not return till after fourteen calendar months from the day of clearing out, but before the 31st of December, in the second year after clearing out, with the greatest quantity of oil or head-matter, (not less than 20 tons in each ship) *four hundred* pounds. To one other ship, cleared out between the 1st of January and 31st of December, 1815, and between the 1st of January and 31st of December in each of the four succeeding years, and which shall double Cape Horn, or pass through the Straits of Magellan *into the South seas*, and fish during four months to the westward of Cape Horn, in those seas, or which shall *double the Cape of Good Hope*, and fish during four months to the eastward of 105 degrees of east longitude from London, and not return till after sixteen calendar months from the day of clearing out, but before the 31st of December, in the second year after clearing out, and having the greatest quantity of oil or head-matter, (not less than 30 tons) *six hundred* pounds. To each of nine other ships, arriving with the next greatest quantity, not less than thirty tons in each ship, *five hundred* pounds. Ships returning with a cargo of oil, as above, to any port of Ireland, are equally entitled to the bounties. The ships are to be navigated by a master and three-fourths of the mariners being the King's subjects, usually residing in Great Britain, Ireland, Guernsey, Jersey, or Man, or if the ships clear out from Great Britain, then they may be navigated by persons being Protestants, and who, not being subjects of His Majesty,

Regulations for carrying on the Fishery.

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have been heretofore employed in carrying on this fishery; and who shall first make oath, if it be their first voyage from Great Britain, that they have already established, or intend to establish themselves and families in Great Britain as subjects thereof; and if it be their second voyage, that they have actually so established themselves. Various regulations are contained in this act for attaining the object designed, and preventing frauds. Each ship is to have on board, for every fifty tons, an apprentice indentured for three years. There is a penalty of fifty pounds on a master permitting his apprentice to quit his service before the expiration of the term. A log-book is to be regularly kept and produced to the collector of the customs at the return home, and verified on oath; and is likewise to be submitted to the captain of any of His Majesty's ships with which they may happen to fall in. The master, mate, and two of the mariners are to make oath, that the oil and head-matter are the produce of their own fishing. A penalty of 500*l.* is incurred if the cargo be made up from the fishing of any other crew. If oil or head-matter be mixed with water to increase the quantity, the whole forfeited, and the premium lost. The quantities are to be ascertained by an officer of the customs. Any produce of the fishing in the going out or returning home, although not taken within the prescribed latitudes, may be reckoned towards the requisite quantity. If a ship make two voyages within any of the periods, she is to have only one premium. Harpooners, line-managers, and boat-steerers, are privileged from being impressed.

Limits of the navigation of ships in the Southern Whale Fishery.

Any ship or vessel employed in carrying on the said southern whale fishery, may sail and pass for that purpose to the eastward of the Cape of Good Hope, and to the westward of Cape Horn, or through the Straits of Magellan. But no such ship, sailing to the eastward of the Cape of Good Hope, shall pass to the northward of the equator, or make more than 51 degrees of east longitude from London; and no such ship, sailing or passing to

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the westward of Cape Horn, or through the Straits of Magellan, shall, either to the northward or southward of the equator, make more than 180 degrees west longitude from London. These ſimits were enlarged by the 38 Geo. III. c. 57., 42 Geo. III. c. 18., 43 Geo. III. c. 90., and 51 Geo. III. c. 34. Licensed ships sailing to the eastward of the Cape of Good Hope, may now pass beyond 51 degrees of east longitude, *provided that*, after passing 51 degrees of east longitude, they shall not pass to the northward of 10 degrees of south latitude until they shall be to the eastward of 115 degrees of east longitude; and that then, until to the eastward of 180 degrees, they shall not pass to the northward of 10 degrees of north latitude. Licensed ships, having passed to the westward of Cape Horn, or through the Straits of Magellan, may also pass beyond 180 degrees of west longitude; *provided that*, after passing the 180th degree, they do not pass to the northward of 10 degrees of south latitude, until within 51 degrees of east longitude from London. Every such ship or vessel intending to sail or pass to the eastward of the Cape of Good Hope, or to the westward of Cape Horn, or through the Straits of Magellan, shall be obliged to take a licence for each respective voyage, from the East India Company, specifying which of the said voyages such ships shall be licensed to perform; and such licence shall be valid only for the voyage therein expressed.

Licences from the East India Company.

But the East India Company is not to be required to grant any licence to pass to the eastward of the Cape of Good Hope, to more than ten ships in any one year or season, or to grant any licence to any ship or vessel, to pass to the eastward of the Cape of Good Hope, unless the person applying for the same shall deliver to the Court of Directors of the Company a manifest, or certificate, under the hand of the collector or comptroller or other chief officer of the customs belonging to the port whence such ship is intended to clear out, verified by the oath of the owner or owners, or the master of such ship,

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specifying the names and places of abode of the owner or owners, and master of the said ship, and also the species, quantity, quality, and value of all goods then on board of such ship, and of all goods (if any) intended to be afterwards taken into, or on board of the same before her departure outwards; and also, unless it shall by such manifest or certificate, appear unto the said Court of Directors, that no goods or merchandizes whatever (save and except the stores of such ship or vessel, and the tackle, materials, and other things necessary for the purpose of the voyage) are taken or intended to be taken on board of such ship or vessel.

But by the 42 Geo. III. c. 77., from the 22nd of June, 1802, British-built ships, legally navigated, may pass through the Straits of Magellan or round Cape Horn, to carry on the fisheries in the Pacific Ocean, from Cape Horn to 180 degrees of west longitude from London, and to trade within the said limits without any previous licence or permission from the East India or South Sea Company. And by the 53 Geo. III. c. 155, ships of 350 tons and upwards, registered measurement, on the Southern Whale Fishery, may pass through the seas to the eastward of the Cape of Good Hope, and westward of the Straits of Magellan, provided that they do not pass farther to the northward than 11 degrees of south latitude, between the 64th and 150th degrees of east longitude from London; without a licence from the Board of Commissioners for the Affairs of India; but no ships of less tonnage shall sail within any of the seas to the eastward of the Cape of Good Hope, or to the westward of the Straits of Magellan, without such a licence from the said Board of Commissioners, specially authorizing the same.

It is not, however, lawful for any ship or vessel to go to, or touch at, any place upon the continent of Asia, from the river Indus to the town of Malacca inclusive, or any island under the government of the East

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India Company, to the northward of the equator, nor the Company's factory at Bencoolen, or its dependencies, or the dominions of China, without a licence in writing from the Court of Directors, specially authorizing the same. The East India Company are not obliged to grant any licence to sail within the limits of their trade round the Cape of Good Hope, until the owners have given bond in the penalty of 2000*l.*, for such ship not taking on board goods, the produce or manufacture of the East Indies, or places between the Cape of Good Hope and the Straits of Magellan, to the value of 100*l.*, except such as are necessary for their voyage. Doing any thing in breach of this act shall disable a ship from being entitled to any licence in future. Power is given to the governor of St. Helena, the commanders of the Company's ships, or agents thereto authorized by the Company, to search licensed ships for East India goods. Ships doubling the Cape of Good Hope, or Cape Horn, or passing through the Straits of Magellan, and not being less than 200 tons' burthen, may be armed for resistance and defence on a licence being obtained from the Admiralty; which licence is to be granted on exhibiting a certificate from the Commissioners of the customs, testifying that such ship is entered out for such voyage, and that the owner has entered into bond, in a penalty of 1000*l.*, with condition that such arms shall be used only for resistance and defence, in cases of involuntary hostility.

And for the easy manning of ships and vessels employed in this fishery, the 54 Geo. III. c. 111, (which repeals the 52 Geo. III. c. 103) enacts, that no ship or vessel employed in the said fishery, the master of which shall have taken the oath, or made the declaration of fidelity and allegiance to His Majesty, required by the act 35 Geo. III. c. 92., shall lose the benefit of any fishing voyage, by reason that the master shall not have taken the oath, or made the declaration of his having already established, or of its being his intention to establish himself and family in Great Britain,

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or by reason that all or any of the foreign Protestants, employed as mariners in navigating such ship or vessel, shall not have taken any of the oaths, or made any of the declarations required by the act passed in the 35th year of his present Majesty's reign, entitled "an act for further encouraging and regulating the Southern Whale Fisheries." Lastly, temptations are held out to invite foreigners to come and settle here, and carry on the southern whale fishery from this country.

British Fishery.

The fishery next in order is the British Fishery, instituted by 23 Geo. II. c. 24., entitled "an act for the encouragement of the British White Herring Fishery." This act incorporated certain persons, under the style of The Society of the Free British Fishery, to continue for twenty years; and enacted certain bounties. This act was continued and amended in some of its provisions by 28 Geo. II. c. 14., the 30 Geo. II. c. 30., the 11 Geo. III. c. 31., and the 19 Geo. III. c. 26. These acts having all expired, the 26 Geo. III. c. 81. was passed, which, with some slight additions by subsequent acts, hereafter subjoined, continues to be the law of this fishery to the present time. These subsequent acts are the 48 Geo. III. c. 110., 52 of Geo. III. c. 153., and 55 Geo. III. c. 94. Upon all these acts, taken together, the law of this fishery is now as follows—

Present rules and regulations of the White Herring Fishery.

From the first day of June, 1809, a bounty of three pounds per ton shall be paid annually to the owner or owners of any whole-decked buss, or vessel, of not less than sixty tons' burthen,(*k*) being British-built, owned in Great Britain, and manned, navigated, and registered, according to law, which shall be fitted out for, and be

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(*k*) Extended to vessels not less than of forty-five tons, by 51 Geo. III. c. 101., corrected by 52 Geo. III. c. 153. But no vessel of between sixty and forty-five tons shall be entitled to any bounty on the tonnage, unless manned with ten men, or with eight men and two boys, not under thirteen years of age.

British Fishery.

actually employed in, the deep sea British white herring fishery, on the coasts of Great Britain or Ireland, in the manner and under the regulations prescribed by this act; provided that such bounty shall not, in respect of any buss or vessel, be computed or paid on any greater number of tons than one hundred, although such buss or vessel shall be of greater burthen. If any buss or vessel, properly fitted for the deep sea white herring fishery, in the manner required by this act, shall be hired for carrying on the said fishery, the persons hiring the same shall be entitled to the bounty on the tonnage thereof, in the same manner as if such persons were owners of such buss or vessel.(*l*)

Bounties to be paid in the White Herring Fishery.

From the said first day of June, 1809, there shall be paid for every barrel containing thirty-two gallons of white herrings, caught in the British fisheries, and landed in Great Britain, and cured and packed according to the directions of the act, a bounty of two shillings.(*m*) This bounty is increased to four shillings by the 55 Geo. III. c. 94. as hereafter mentioned. The statute then proceeds with a detail of the manner of appointing commissioners, officers, &c. for the execution of the act. It then proceeds to enact, that every vessel so claiming bounty shall have been fitted out with sixteen bushels of salt for every last of herrings which such vessel shall be capable of containing, and shall have a net of three hundred square yards for every ton of admeasurement, and with the number of men following: ten men, if the vessel be sixty tons; eleven men, if not exceeding seventy tons; and one man for every ten tons exceeding seventy, two of which number respectively may be foreign seamen. Such vessel shall be cleared out from the port of Great Britain, where she was *bonâ fide* fitted for her intended voyage, and shall proceed directly to Brassey Sound, in Shetland, where she shall arrive on or before the twenty-second day of June, in each year; and the crew shall not shoot or wet the nets before the twenty-fourth day of

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(*l*) 48 Geo. III. c. 110. (*m*) *Idem.*

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the same month, from which day they shall continue to fish in manner herein described on the coasts of Great Britain or Ireland, until the fifteenth day of September following, unless before the last-mentioned day the quantity of herrings taken, and cured, and packed on board thereof, shall amount to four barrels of herrings not repacked, or in the state in which they are called sea-sticks, for every ton not exceeding one hundred tons of the admeasurement of the vessel; and that no fish, other than herrings, shall be taken or cured by the crew of such buss or vessel, nor shall any fish, not taken by the crew thereof, be received on board the same during the whole course of the voyage, save only for the sustenance of the crew; and that all the herrings which shall be taken by the crew, and cured and packed on board, shall be landed in Great Britain.

All owners, or their agents, intending to claim bounty for the deep sea British herring fishery, shall give a notice, in writing, to the officer of the port at which they fit out, and which notice shall express the name of the vessel, the port to which she belongs, and whether British built, or prize ship, lawfully condemned; as likewise the names of the owners, and the master, the tonnage, and the date of registry; and shall further specify the quantity of salt, the number of barrels full, and that of those empty; the quantity of netting, of materials for the same, and of provisions for the crew; the particulars of which such officer of the port shall examine, and certify (if duly specified) upon the back of such notice. Upon which, one or more of the owners, *and* the master, shall make oath of acting in conformity with the said notice and the act; such oath and notice shall be transmitted to the commissioners; and such owner and master shall enter into bond with one or more sureties, in a sum of treble the amount of the bounties, for the faithful performance of the voyage and its conditions. The herrings, taken daily, to be distinguished from all other herrings, by marks

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upon the barrels. The master to keep a journal, in the usual form of a seaman's journal. The owners to pay to the crew two shillings per barrel, over and above their wages, by agreement (*n*). The remainder of the act contains regulations for the duties of the officers of customs; and punishments for perjury and fraud, or misdemeanours, committed under the act.

This act, 48 Geo. III. c. 110. together with the 51 Geo. III. c. 101. by which it was amended, and the 52 Geo. III. c. 153. which rectified a mistake, continued in force until the first day of June, 1813, and thence to the end of the next session of parliament. It has been subsequently amended, and rendered perpetual, by the 55th Geo. III. c. 94. The principal amendment in this last act, which is now the law of the British fishery, respects the increase of bounty, and some powers granted to superintendants of the fishery to seize nets, &c.

Instead of two shillings per barrel, the bounty under the 48 Geo. III. c. 110., the 55 Geo. III. c. 94. enacts, that a bounty of four shillings per barrel shall be granted after the first day of June, 1815.

The same act allows the vessels employed in the herring fishery to take cod or ling, which was prohibited in the 48 Geo. III. It likewise authorizes a superintendant, appointed by the Lords of the Admiralty, to proceed to any place, to which the Commissioners of the herring fishery may send him, to prescribe order amongst those employed in such fishery, and gives him the necessary powers for this purpose. The master of every vessel is required to make oath of the quantity of salt used and expended in curing the herrings, and that no part of such salt was embezzled or sold. Herrings to be cured and packed within twenty-four hours after they are taken. The act then proceeds with several regulations

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(*n*) 48 Geo. III. c. 110.—See sections *passim*.

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in detail to prevent fraud in the salt duties, in transhipment, or re-packing in additional barrels; and further regulates the curing of herrings in bulk, the curing them in pickle, vats, and cisterns; the size of the letters to be branded on the barrels, and the certificates for re-packed herrings sent coastwise.

Salt acts in support of the British Fishery.

The above acts, together with the salt acts, or acts allowing the use of salt, duty free, for the purpose of the fisheries, now constitute the law of the British fishery. The salt acts, as they concern the fisheries, are the 41 Geo. III. c. 21., and the 55 Geo. III. c. 179.

The 41 Geo. III. c. 21. allowed (till October 1801,) all persons engaging in these fisheries (*i. e.* herrings, pilchards, mackerel, and all sorts of wholesome fish,) to ship on board their respective vessels as much salt, duty free, as may be deemed necessary, for curing and preserving the fish expected to be taken, in the proportion of ten bushels for every ton burthen of the admeasurement of the vessel. Such persons to make entry at the next excise office of their names, abodes, and warehouse, where they propose to store such salt, and likewise give bond to the commissioners of excise, in five hundred pounds, to give due account to the excise of the use of such salt, according to this act; and that no part of it has been embezzled, sold, or otherwise disposed of, than according to the manner allowed by the act. The other provisions of this act merely regulate the duties of excise officers to prevent frauds, and the means of prosecuting breaches of the act, of recovering penalties, &c. When salt shall have been shipped, according to the clause above-mentioned, the excise officer shall give a certificate, which shall specify the name of the vessel and master, the tonnage, the quantity of salt shipped, and the warehouse from whence taken; the port whence sailing, and whither bound. And, upon arrival at the port of unshipping, the master shall make entry, in writing,

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within twenty-four hours, with the proper officer of excise, specifying the quantity and kind of the cargo, the account of the salt expended in curing, and of the quantity remaining unused. The master furthermore to produce the certificate from the excise officer of the port from whence he first shipped his salt. The excise officer then to proceed on board, and to grant permission under his hand for unlading and landing such fish. The 55 Geo. III. c. 179. revives and continues the 41 Geo. III. c. 21. until the 25th day of March, 1821; and contains no new enactment, except that a greater allowance of salt shall be made for cod, ling, and hake, than under the 41 Geo. III. The 55 Geo. III. c. 179. provides, under this head, that, from and after the passing of this act, there may be given for, or in respect of, cod, ling, or hake, cured and preserved by dry-salting in bulk, and produced to the proper officer of excise, in a good, wholesome, and merchantable state, a credit or allowance, not exceeding fifty pounds, of salt, for every one hundred weight of such cod, ling, or hake, so cured, preserved, and produced. It is, however, provided, that nothing contained in this act shall be deemed to extend to authorize making or giving any credit or allowance for salt used in the salting, curing, or preserving, any such cod, ling, or hake, beyond the quantity of salt actually and *bonâ fide* employed and spent in the curing and preserving thereof by dry-salting in bulk.

Summary.

The result of the several laws for the protection and encouragement of the British fishery may be condensed into the following Rules:—

RULE I.

No British ship or vessel shall be permitted to sail from any of the ports of this kingdom, or of the island of Guernsey, Jersey, Alderney, Sark, or Man, to be employed in the fishery on the said coasts, unless wholly

Summary. and solely manned with, and navigated by, a master and mariners, ALL British subjects, 34 Geo. III. c. 68. sect. 4. 42 Geo. III. c. 61.

RULE II.

No sort of fish whatever, of foreign fishing, except eels, stock-fish, anchovies, sturgeon, botargo, or caveare, turbots, and lobsters, can be imported into England.

This prohibition depends upon 18 Car. II. c. 2. (originally a temporary act, but made perpetual by 32 Car. II. c. 2.) 10 and 11 William III. c. 24. 1 Geo. I. stat. 2. c. 18. 9 Geo. II. c. 23. and 26 Geo. III. c. 81. sect. 43, 44.

RULE III.

Fish, of every kind and sort whatsoever, of British taking and curing, caught or taken in any port of the ocean, by the crews of any vessels built in Great Britain, &c. or in any of the plantations or territories belonging to Great Britain, owned by His Majesty's subjects, and navigated and registered according to law, may be imported into Great Britain in vessels owned, navigated, and registered as aforesaid, without payment of any duty whatsoever, 49 Geo. III. c. 98. sect. 13.

This act provides as a further security, that oath shall be made before the collector or other chief officer of customs, at the port of importation, that such fish was actually caught and cured wholly by His Majesty's subjects.

Bounties. By 26 Geo. III. c. 81, and several subsequent acts, a bounty is paid on the export of pilchards, or shad, cod-fish, ling, or hake, whether wet or dried, salmon, white herrings, red herrings, and dried red sprats, being of British fishing and curing. Drawbacks are likewise allowed from the salt duties, for encouraging the export of certain fish; and for the purpose of curing and preserving them, salt is directed by certain acts, as we have above shewn, to be delivered to the fish-curer, and to be used free of duty, 38 Geo. III. c. 89., 41 Geo. III. c. 21., 55 Geo. III. c. 179., (which expires 25th March, 1821,) and 57 Geo. III. c. 49.

Summary.

By 51 Geo. III. c. 34., and 55 Geo. III. c. 45., premiums are given to vessels engaged in the Southern Whale Fishery.(*o*). And by 48 Geo. III. c. 110., which was corrected and amended by two subsequent acts, and made perpetual by 55 Geo. III. c. 94., certain liberal bounties are given, under regulations extremely wise and politic, to persons engaged in the British white herring fishery. Formerly bounties were given for a limited time to vessels employed in the Newfoundland fishery and parts adjacent, but they ceased in the year 1811. In the Greenland and Davis's Straits Fisheries, bounties are given by various acts of parliament, to which we have already drawn the reader's attention. It should seem, however, that these bounties will cease on the 25th March, 1820. And for the further encouragement of the fisheries of this kingdom, the 50 Geo. III. c. 108. protects the persons employed in them from impressment, under certain qualifications. (*p*)

Cases and decisions.

With respect to the fisheries, few cases have arisen in our courts of law. There is one case, however, which, on account of its importance, requires to be stated at length. Trover for a whale, (*q*) the half of a whale, and certain quantities of whale-flesh, blubber, oil, spermaceti, and whale-bone. Upon the trial of this case, at Guildhall, before Lord Chief Justice Mansfield, it appeared that the plaintiffs were the owners of the William

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(*o*) See *ante*, p. 207.

(*p*) See the clauses of the act.

(*q*) Fenning and others *v.* Lord Grenville, 1 Taunt. 241. May 24, 1808.

Cases and decisions.

Fenning, and the defendants owners of the Caernavon, both being ships employed in the summer of the year 1805, in the Southern Whale Fishery, among the Gallipagos Islands. While Luce, the captain of the plaintiff's ship, was engaged in killing a whale, he struck another, one of a shoal, with an harpoon made fast by a short line or warp to a small buoy called a droug. The wound produced the usual effect of this weapon. It retarded the progress of the fish, by causing it to struggle with the harpoon for a considerable time, while its companions escaped into the offing. The droug, floating on the water, marked its course, so that it was with more certainty pursued by Anthony, the master of the Caernarvon, who, in consequence of a signal made to him by Luce, followed the fish, and killed it. He extracted from it the oil and other valuable matter, but rendered no part of it to the plaintiffs. Numerous witnesses deposed, that a custom had universally prevailed in these seas, from the origin of the fishery until within a few years past, that the party who first struck the fish with the droug should receive one half of it from the party who killed it. But it appeared by the testimony of the defendant's witnesses, that for a few years part, since 1792, many captains of the ships employed among the Gallipagos islands, among others, an American, had usually agreed that the striking a fish with a droug should not entitle the striker to a share. In the year 1805, Anthony, with five or six English captains, of whom Luce was not one, had, upon their arrival at the fishing station, acceded to these terms. The defendant's counsel contended that the plaintiff must be nonsuited, because, according to his own claim, he was tenant in common with the defendant; but on account of the testimony of one witness, who stated that the person who first struck the fish was entitled to the whole, rendering half to the party who killed it, the Chief Justice left the case to the Jury, who found, that by the custom the plaintiff was entitled to half the fish, and gave him in damages the value of a moiety. A rule *nisi* for a new trial was ob-

Cases and decisions.

tained, upon the ground that either there was not such a custom of a particular trade as to be binding in law; or, if ever there had been such a custom, the verdict was contrary to the evidence of the present practice of the fishery; and the dissent of the captains now frequenting those seas remitted all the parties to their common law right; which was, that possession alone confers property in animals *feræ naturæ*, and that the striking with a missile weapon gives no property in them. The defendant's counsel likewise claimed to set aside the verdict, upon the ground that the parties being tenants in common, the action could not be maintained. In shewing cause against the new trial, the plaintiff's counsel contended, that there was evidence of a general custom established in this trade, sufficient to make it obligatory upon all who frequented that fishery. In the GREENLAND TRADE *the custom indeed is the reverse.* There the question is, whether the whale is a fast or a loose fish; unless the harpoon is in the whale, the whale fast to the towing-line, and the towing-line attached to the boat, the first harpooner has no right; the taker always has the whale.(r) But although that practice differs from the law established in these islands,

Custom of the Greenland trade.

(r) In an action of trover for a whale, which had been struck by a harpooner of the plaintiff's ship, and afterwards by a harpooner of the defendant's, the counsel on both sides, and all the parties concerned, agreed the law to be, both by the custom of Greenland, and as settled by former determinations at Guildhall, London, as follows:—While the harpoon remains in the fish, and the line continues attached to it, and also continues in the power or management of the striker, the whale is a *fast* fish; and though during that time struck by the harpooner of another ship, and though she afterwards break from the first harpoon, but continues fast to the second, the second harpoon is called a *friendly* harpoon, and the fish is the property of the first striker, and of him *alone.* But if the first harpoon or line breaks, or the line attached to the harpoon is not in the power of the striker, the fish is a *loose* fish, and will become the property of any other person who strikes and obtains it.—Littledale and others *v* Scaith and others, York Lent Assizes, 1788, cited in 1 Taunt. p. 243.

Cases and decisions.

the numerous cases which have been decided on the custom of the Greenland Fishery sufficiently shew that the local rule is binding within its own limits. Although this custom is not so old as the common law, yet it is as old as the trade itself, and it is equally binding with the comparatively modern custom of merchants, which postpones the payment of a bill of exchange during the three days of grace. This fishery, they added, is not confined to the *English*. The French, Americans, and many other nations, partake in it. As the law which regulates it affects the subjects of so many different nations, it may become a matter of treaty, or a cause of warfare, between their respective governments; and though, like many other customs of trade, it had its commencement in the practice of a few, it is not now to be altered by any other than the supreme authority. It is not, therefore, competent for five or six Englishmen to legislate for all their fellow-subjects, and even for all the world. Even if it had happened that those persons and the plaintiff were all who fished there in that season, what case is there except that of a co-operation, so constituted by law, where the act of the majority can bind the minority. But further, the very evidence of an agreement to supersede the custom, proves the continuance of it; and the utmost the defendant can urge, is, that there was conflicting testimony as to any conventional alteration of the law, upon which the Jury, whose proper province it is, have expressly decided that the old custom of the trade still continues. It is immaterial whether this be called an universal agreement in the trade, or a custom. If it be necessary to consider this practice as in the nature of a law, it possesses the quality so essential to that character—of being highly reasonable. For all the witnesses agreed that he who strikes a whale with a droug, most materially contributes to the taking of it. But it is not necessary to shew this; for, if it be considered as an agreement, there is clear evidence that it has been universally adopted in the trade; it must, therefore, remain in force, unless it be proved

Cases and decisions.

that there is a subsequent agreement superseding it, which has been adopted by the plaintiff; but as he was not a party to the agreement of the few other adventurers, his right cannot be affected by it. As to the second point, they contended that the cutting up of the whale, and expressing the oil, was such a destruction of the subject matter of a tenancy in common, as would enable one tenant in common to maintain trover against his companion. The plaintiff in this case is entitled to the possession of the whale in *specie*, either to the whole, or part; if to the whole, the defendant was guilty of a tortious conversion in cutting it up, and using it as his own; if to a part only, the defendant having put it out of the plaintiff's power to take possession of it in its original state, the right of action accrues.

The defendant's counsel was stopped by the Court.

MANSFIELD, C. J.—There is no pretence to say that the custom proved was such, that the owner of the droug should have the whole whale, subject to the claim of the taker for a moiety of the proceeds: and it would be very inconvenient if it were so; for the fish might often be killed at a great distance from the vessel of the former. This is an action of trover, founded on the defendant's taking the plaintiff's property, and converting it to his own use. According to the custom proved for the plaintiff, the fish belongs to the two parties, and they are *tenants in common* of the whale. It is admitted that the taking by the defendant, and his refusal to deliver, is no misfeasance in a tenant in common, and does not give a right of action. Can it then be contended that, although he has a right to keep the whale, he has not a right to apply it to the only purpose which can make it profitable to the owners? He must of necessity have a right to do that which is requisite for the preservation of the chattel; otherwise it becomes good for nothing.

Cases and decisions.

I can understand why his destroying that which belongs to his companion should give a right of action; but I cannot see why his preserving it should have the same effect. It would be difficult for the defendant to get rid of the merits of the plaintiff's case, though a considerable degree of doubt might be created by a change of practice in the trade; but it is unnecessary to decide that question. HEATH, J., was of the same opinion. LAWRENCE, J., said, I collect from his Lordship's notes, that he who struck with a droug is entitled to half (the whale); as some witnesses say, to half the oil; as others, to half the blubber; and since there is a tenancy in common, one tenant cannot sue the other. But it is said, if the one party is entitled at the time the whale is killed, the other cannot change the form of the property, though it tends to preserve the thing itself, and that the changing it is a tortious conversion; but no case has been cited which warrants this position. The whale is killed at sea; and the only thing to be done with it is, to convert it into oil. The defendant has done that which is for the benefit of all parties. They are tenants in common of the produce, just as they were of the whale; and, consequently, the action is not maintainable. CHAMBRE, J. There must of necessity be a custom in these things to govern the subjects of England, as well amongst themselves, as in their intercourse with the subjects of other countries. The usage of Greenland is held to be obligatory, not only as between British subjects, but as between them and all other nations. I remember the first case upon that usage which was tried before Lord Mansfield, who was clear that *every person was bound by it;* and said, that were it not for such a custom, there must be a sort of warfare perpetually subsisting between the adventurers; and he held it strongly binding, from the circumstance of its extending to different nations. The same necessity must prevail in the South Seas, although the fishery has not been so long in use, in order to regulate our intercourse with the French, Americans, and others, who resort thither. A few persons may, by compact among themselves, for a particular season, renounce any advantages, and subject themselves to any disadvantages which they please, and this would bind all those who assented to it; but Luce was no party to this compact. But upon the second point I entertain no doubt. The demand which is supposed to have been made by the plaintiff for an actual division, was not proved; and if such a demand had been made, an instantaneous division was impracticable on account of the bulk of the animal. The practice in the fishery is, to preserve that which is valuable, and to throw away that which is useless; for which purpose it is necessary first to cut up the fish. The Court made the rule absolute to enter a *nonsuit*.

Customs of the Greenland and Southern Whale Fishery.

From the preceding case, which is the leading and almost the only case on the subject, the following rules may be drawn:—First, that in the Southern Whale Fishery, he who strikes a whale with a loose harpoon is entitled to receive half the produce from him who kills it. The fish belongs to the two parties, and they are tenants in common of the whale. Secondly, that the custom in the Greenland Whale Fishery is the reverse; the rule in that trade being that, unless he who strikes a fish continues his dominion until he reduces it into possession, any other person who kills it acquires the entire property. Thirdly, that where the general consent of the persons engaged in a trade has established certain rules for the conduct of that trade, it is not competent for any number of individuals to establish a contrary regulation; for, although they may agree among themselves to adopt new rules, they cannot thereby deprive one, who has not assented to their compact, of the benefit of the old rules, as against themselves; more especially if the trade and the custom be of such a nature that the subjects of several nations partake in the trade, and are governed by the custom; and it makes no difference in such trade, though it

Customs of the Greenland and Southern Whale Fishery.

be of recent origin. Fourthly, this case establishes (though the point is a principle of general law, and has no peculiar relation to the present subject of the fisheries,) that one tenant in common of a chattel cannot maintain trover for it against his companion, unless the latter have so disposed of it as to render it impossible that the plaintiff should ever take and use it. (s) Fifthly, that the conversion of a chattel by a tenant in common (in this instance of the whale,) to its general and profitable application, though it change the form of the substance, is not such a destruction of the subject matter, as to prevent the plaintiff from taking and using it in its altered state; therefore, it creates no right of action.

What is a returning to port to entitle a ship to the bounty.

In an action by the owners of a vessel employed in the Southern Whale Fishery against the commissioners of the customs, for the recovery of the bounties given by the legislature for the encouragement of that trade, it was held by Lord Kenyon, that the arrival at a place within the Exchequer survey of a port, though no duties be in fact collected in such place, was a returning to a port in Great Britain, within the meaning of the act of parliament; and although it was stated, that the uniform and established rule adopted at the custom-house in all cases of bounties limited as to time was to construe "months," when mentioned in acts of parliament, as calendar, and not lunar months, his Lordship held, that the months within which the voyage was to be performed, must be taken to be *lunar* months. (t) In the same case it was likewise held, that an affidavit verifying the muster-roll, upon which it appeared that the proper number of apprentices was on board when the vessel *cleared out,* was a sufficient proof of the fact of such apprentices being on board when the vessel sailed.(*u*)

(s) Where a ship was sent to the West Indies and lost in a storm; in an action of trover by a joint owner, Lord King, C. J. left it to the Jury, whether this was not a destruction. They found that it was. Bull. N. P. 34.

(t) The words in the acts of Parliament on which the bounties now depend are *calendar* months.

Of the national character of fishing vessels.

In general, it has been the practice, in time of war, not to make capture of fishing-boats and small vessels, engaged in the coast fishery. But this is a matter of amity, and not of national right. Thus, in the Young Jacob and Johanna.(*x*) This was the case of a small Dutch fishing vessel, taken April 1798, on her return from the Dogger Bank, in Holland, and claimed for merchants there. Sir William Scott, in his judgment, observed, that in former wars it had not been usual to make captures of these small fishing vessels; but this rule was a rule of amity only, and not of legal decision; it has prevailed from views of mutual accommodation between neighbouring countries, and from tenderness to a poor industrious order of people. In the present war there has, I presume, been sufficient reason for changing this mode of treatment; and as they are brought before me for my judgment, they must be referred to the general principles of this court. They fall under the character and description of ships constantly and exclusively employed in the enemy's trade. But it has been argued, in distinction, that vessels of this kind have no decisive character arising from destination, or from the port of their return. They come, it is said, frequently to this country, and resort indifferently to any port which will afford them a market. When a case shall occur of a vessel so destined occasionally to the ports of this country, it will be time enough to consider by what rule it is to be governed; but all the facts of this case point so entirely to Holland, that I have no hesitation in pronouncing that it is subject to condemnation.

(*u*) 1 Esp. 246.

(*x*) 1 Rob. 19.

CHAPTER VII.

THE REGISTRY ACTS.

THE next and last part of our navigation system is that which is intended to crown and give effect to the whole, namely, the registry of British ships, so as to ascertain their built and property; to prevent foreigners from being concealed owners in them, and to render it impossible for our merchants to evade the laws which the legislature has established for the maintenance and advancement of our naval interests.

Original object of the Navigation Act, as to the built and ownership of British ships.

Before we enter upon this subject it will be necessary shortly to state, what the navigation laws had required as to the built and ownership of vessels, previous to the 26 Geo. III. c. 60. The principal object of the navigation act, as to the character of the shipping, was to provide that the vessel should be British property, which the legislature at that time deemed to be sufficient for the two ultimate ends of the system—the maintenance of the navy by the encouragement of sailors, and of commerce by the profits of the carrying trade and colonial monopoly. It was only in a more advanced state of the system that they began to look to the *built* of the ships, and therein to the further prosecution of our naval interests by the encouragement of docks, ship-building, and domestic artificers. Under these confined views in its original objects, the statute of 12 Car. II. was satisfied with requiring that the shipping, employed in the plantation trade, should *belong* to the people of this country, or, (allowing an alternative) should be of the *built* of, and belonging to the plantations. If the ship, therefore, were owned by persons in the mother country, it was immaterial where it was built; but if it was owned by some persons in the plantations, it must also have been built there. In the trade with Asia, Africa, and America, the ship might be owned by any subject of this country or the plantations, and nothing is said of the built. The act looked merely to the ownership. In the European trade, the act directs only that goods of the growth, &c. of Russia, (and the other enumerated goods in the eighth section,) shall be imported in ships which *belong* to the people of England, Ireland, &c.; except currants, and goods, the produce of the Turkish empire, which are not to be imported but in vessels of English built; the clause being silent as to the ownership. In the coasting trade no stranger is to be owner, or part owner, of a ship: but no provision is made to secure an English built; and in the fishery the rule only was, that the ships engaged therein should be *owned* by subjects of this country. And although in all these trades the act invariably required that the master and three-fourths of the mariners should be English, in the fishery nothing is said of the master and mariners.

Original object of the Navigation Act, &c. &c.

Lest any vagueness or *ambiguity* should exist as to the term English shipping, where it was required, the seventh section of the navigation act defines what is to be understood by it; that is to say, "shipping built in England, Ireland, Wales, the islands of Guernsey or Jersey, or town of Berwick upon Tweed, or in any of the lands, islands, dominions, or territories to His Majesty, in Africa, Asia, or America, belonging, or in his possession." And it provides that where any ease, abatement, or privilege, is given in the book of rates to goods or commodities imported or exported in English built shipping, it is always to be construed as extending only to *such* ships whereof the master and three-fourths of the mariners are English. And wherever it is required that the master and three-fourths of the mariners should be English, the act declares that the true intent and meaning of this provision is,

What was to be deemed English shipping.

Original object of the Navigation Act, &c. &c.

that they should be such during the whole voyage, unless in case of sickness, death, or being taken prisoners in the voyage. And, in order to prevent frauds in *colouring*, (as the act terms it,) and buying foreign ships, the tenth section provides, that no foreign built ship shall be deemed or pass as a ship belonging to England, Ireland, &c., or enjoy the benefit and privilege of such a ship or vessel, until the person claiming the property in such vessel shall make appear to the chief officer of the customs in the port next to the place of his abode, that he is not an alien, and shall take an oath before such chief officer, that such ship was bonâ fide, and without fraud, bought by him for a valuable consideration, expressing the sum, as also the time, place, and persons from whom it was bought, and who are his partners, if he have any; all which partners are required to take the same oath before the chief officer of the customs of the port next to their abode; and that no foreigner, directly or indirectly, has any interest, part, or share therein. Upon taking this oath, the chief officer of the customs is to grant a certificate, whereby such ship may for the future pass, and be deemed as a ship belonging to the said port, (port of the officer's residence,) and enjoy the privileges of such ship. A register of such certificates was to be kept, and sect. 11. inflicts penalties upon officers of customs, who should allow the privilege of an English ship to such ship coming into port and making entry, until examination whether the master and three-fourths of the mariners were English; or who should allow such privilege to a foreign built ship, bringing in commodities the growth of the country where it was built, without examination and proof whether it was a ship of the *built* of that country, and that the master and three-fourths of the mariners were of that country. So, likewise, if any governor should allow a foreign built ship to load or unload before such certificate be produced, and examination made, whether the master and three-fourths of the mariners be English, such governor is for the first offence to be removed from his office.

Encouragement of British shipping by 13 and 14 Car. II. and 1 Jac. II.

We have seen that the act of navigation, except in two instances, was content simply with encouraging *property* in shipping, and was indifferent as to the built; but the benefits of the new system began soon to be felt, and it was the policy of the legislature to force them to the utmost. The 13 and 14 Car. II. c. 11. provides, that for the better increase of shipping and navigation, the collectors of the customs in all the ports of England should forthwith give an account to the collectors and surveyors of the port of London of all foreign built ships in their ports, owned and belonging to the people of England, and of their built and burthen. The collectors and surveyors were further required to make a list of all such ships, and to transmit it to the Court of Exchequer, before 1st December, 1662, there to remain upon record. The act then provides, that no foreign-built ship, that is to say, not built in any of His Majesty's dominions of Asia, Africa, and America, or other than such as shall be bonâ fide bought before the 1st of October, 1662, and expressly named in the said list, should enjoy the privilege of an English ship, although owned or manned by English, (except such ships as were taken by letters of marque, or condemned as lawful prizes in the Courts of Admiralty,) but that all such ships should be deemed aliens' ships, and pay duties as such. The same act gave a bounty for seven years to persons building ships of three decks, or two decks and a half, with a forecastle, and five feet between each deck, mounted with thirty pieces of ordnance at least, The object of this provision was, for the increase of good and serviceable shipping, and for securing the public trade and commerce.

The next act for encouraging British shipping, 1 Jac. 2. c. 18. was by continuing certain payments and duties upon foreign-built ships, employed in the coasting trade. We have already spoken of this act.

System of registry introduced in the

Then follows the 7 & 8 Will. III. c. 22. The professed object of this statute was to give a monopoly of the

Plantation Trade by 7 & 8 W. III. c. 22.

colonial trade, both in import and export, to British-*built* shipping exclusively, and to prevent frauds by colouring foreign ships under English names. In order to check this growing evil, it was proposed to institute a strict system of registry in the plantation trade. The act, therefore, provides that no ship should be deemed or pass as a ship of the built of England, Ireland, &c. or any of the plantations in America, so as to be qualified to trade to, from, or in the plantations, until the person claiming property therein should register it in the following manner. If the ship, at the time of the register, belonged to any port of England, Ireland, Wales, or Berwick, then proof was to be made on oath of one or more of the owners before the collector or comptroller of that port. If the ship belonged to the plantations, or to Guernsey or Jersey, then the like proof was to be made before the Governor, together with the principal officer of His Majesty's revenue, residing in the plantation or island. The act then gives the form of the oath, and directs that it shall be attested by the Governor or custom-house officer who administers it, under their hands and seals; that it shall be then registered and delivered to the master of the ship, for the security of her navigation. A duplicate of the register is to be transmitted to the commissioners of the customs for the port of London, to be entered in a general register to be there kept. Any ship trading to or from the plantations, and not having made proof of her built and property as directed by this act, to be forfeited as a foreign ship, except prizes regularly condemned; and the 19th section directs that such prizes shall be specially registered.

Oath to be taken by the owner of a ship employed in the Plantation Trade.

This act exempts from registry fishery boats, hoys, lighters, barges, or any open boats or vessels, though of English or plantation built, whose navigation was confined to the coast. And the 21st section enacts that no ship's name, when registered, shall be afterwards changed without registering such ship *de novo*, (which was also required to be done upon the transfer of property to another port)

Ship's name not to be changed.

and delivering up the former certificate to be cancelled, under the before-mentioned penalties. And in case there should be any alteration of property in the said port, by the sale of one or more shares in any ship after registering thereof, such sale was always to be acknowledged by indorsement on the certificate of the register before two witnesses, in order to prove that the entire property in such ship remained to some of the subjects of England, if any dispute should arise thereupon.

Forms to be complied with in an alteration in the property of any ship.

The provisions of this act did not, however, wholly exclude frauds. The certificates of the register were often sold to foreigners; and such certificates being delivered to the purchasers, the ships of foreigners, under colour thereof, were introduced into the plantation trade. To prevent this practice, the 15 Geo. II. c. 31. enacted that no ship required to be registered, and carrying goods, &c. to or from the plantations, should be permitted to trade, or be deemed qualified for that purpose, until the master, or person having charge of such ship, should upon oath, before the governor or collector of customs of the plantation where he arrived, give a just and true account of the name and burthen thereof, and of the place from whence she came, and of other particulars.

Further securities required by 15 Geo. II. c. 31.

And because masters of ships frequently lost and mislaid certificates, to the great prejudice of the owners, who thereby lost their voyages, and were deprived of the benefit of registering their ships *de novo*, the act further provides, that if any ship duly qualified to trade to, from, or in His Majesty's plantations, should happen to be in any of the plantations, and the certificate of the register should be lost or mislaid, the master, or person having charge of the ship, may make oath before the governor or collector of the customs in the port where the ship should happen to be, (according to a form given by the act,) that the ship, as he verily believes, was registered according to law, that she had a certificate granted at such a port, but that it is

Of the forms to be complied with upon the loss of a ship's certificate of registry.

lost and mislaid, and he cannot find it, nor knows where it is, nor what is become of it; that it has not been, nor shall be, with his privity and knowledge, sold or disposed of to any person whatsoever; and that he, and three-fourths of the mariners navigating the ship, are British subjects, and that the ship does now, as he believes, belong wholly to British subjects, and that no foreigner has, to his knowledge or belief, any share, property, or interest therein. The master is likewise to give security in a certain amount, proportioned to the ship's burthen, that she was duly registered for the plantation trade, and that the certificate of the register, if found, shall be delivered up to the commissioners of the customs to be cancelled; that no illegal use has been, or shall be made of it, and that the same has not been or shall be fraudulently disposed of, and that the ship wholly belongs to British subjects. Upon such oath and security the governor and collector is to give a certificate, without any fee, under their hands and seals, of his having made such oath and given such bond; and thereupon the ship is to have liberty to trade for that voyage only, and the officers who take such oath and bond are to transmit an account thereof to the commissioners of the customs.

Of the means of obtaining a certificate *de novo.*

In order to obtain a certificate *de novo*, the master and one of the owners are to make proof, upon oath, (to the satisfaction of the commissioners of the customs, if the owners lived in Great Britain, Ireland, Guernsey, or Jersey, and of the governor and collector of the customs in the plantations, if the ship was registered in the plantations, and none of the owners resided in Great Britain, Ireland, Guernsey or Jersey,) of the loss of the certificate, and also of the name, built, property, and other particulars required by 7 & 8 Will. III., and before the same persons, as is required in the case of original registers, and to give security in 500*l.* if the ship is of one hundred tons, and so in proportion if more, to the collector of the port to which the ship belongs; that the original certificate has not been, nor shall be, fraudulently disposed of, or used contrary to law, and that, when found, it shall be delivered up to be cancelled. In such case the ship is to be registered *de novo,* a certificate to be delivered to the owners, as directed by 7 & 8 Will. III. stating it to be granted by virtue of this act; and such new register is to have the same force and effect as the original register.

Prize ships put upon the same footing as British-built ships, and ships built in the Isle of Man.

The next statute in order was the 20 Geo. II. c. 45., by which prize ships, legally condemned, were put upon the same footing as British built ships, and, with the same privileges, made subject to the same regulations. By 7 Geo. III. c. 45., ships built in the Isle of Man, and owned by the King's subjects there, were directed to pass as British built ships, upon the persons interested therein making proof of the built and property according to the forms of the 7 & 8 Will. III.

Foreigners not to contract for a share in a British ship without consent of the owners of three-fourths in value.

But notwithstanding so many cautious restrictions, it was still found difficult to exclude foreigners from becoming largely interested in British ships; the 13 Geo. III. c. 26. was, therefore, passed to stop the increase of this mischief. Amongst other things it recites, that many inconveniences had arisen from foreigners and other persons, not natural born subjects, becoming possessed of, and entitled to any part or share in British ships; that, by reason of this practice, other part owners of a ship could not obtain the register required by the act of William for the security of the navigation of the ship, whereby the trade and commerce of the kingdom had been greatly hindered and obstructed. In order, therefore, to prevent such abuses in the sale of shares of British-built ships to foreigners, this statute in express terms enacts, that no foreigner, or other person not being a natural-born subject, shall be entitled to, or shall purchase, or contract for, any part or share of any British ship or vessel belonging to natural-born subjects, without the consent in writing of the owner or owners of three-fourth parts in value at least of such ship or vessel first obtained and indorsed on the certificate of the register before two witnesses; otherwise such agreement, purchase and sale, to be void. The last act, previous to the 26 Geo. III. was the 18 Geo. III. c. 56. By this act the plantation trade was thrown open to Ireland, and ships and vessels built and owned by His Majesty's subjects in that country were declared entitled to all the privileges of British-built vessels.

We now come to the celebrated act of the 26 Geo. III. c. 60. The changes which had happened in America, and the prospect of an independent commercial state about to arise in the vicinity of our colonies, suggested the necessity of some stricter regulations as to our plantation trade. Frauds, as respected our shipping, were of frequent occurrence in our colonies; and British vessels, with plantation registers, were constantly sold or fraudulently transferred to foreigners. An improved system of registration was likewise deemed necessary to check the enormous growth of smuggling. This evil, it was thought, might be restrained, if every vessel were to be registered at the port to which she belonged. The true name of the vessel might then be easily ascertained, together with the name of the master and of the port. And if the names and occupations of all the owners were required to be described before a certificate of registry could be granted, it might be expected that many persons would be discouraged from engaging in the building, equipping and employing vessels of this description, from the apprehension that their names must appear; and if such ships were made subject to forfeiture on being found without a register, they could not escape under the colour of foreign documents. (*y*)

Origin and policy of the modern registry acts.

These were among some of the reasons which suggested an alteration in the system of registry. The defects in the old registry laws were obvious; and the principal one was, that evasion was easy. As the law stood, registers were granted in pursuance of the 7 & 8 Will. III., and

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(*y*) Reeves, 401.

Origin and policy of the modern registry acts.

15 Geo. II. c. 31. The act of William confined the trade to and from the plantations, to British-built ships, owned by British subjects; or to foreign ships taken as prize, and legally condemned: but notwithstanding no other sort of ship was entitled to a register, it had been the practice to grant registers to foreign ships wrecked or stranded on the coasts of this kingdom, on their being purchased and repaired by British subjects; and foreigners, not only in our colonies, but in all parts of the world, were found constantly engaged and interested in British vessels. (z) Many other inconveniences were experienced under the old system; and, more especially, the difficulty of tracing the property in ships, and their transfer from one owner to another. And when it was considered how great was the national stake in this species of property, and how considerable a part it composed, not only of the wealth but of the actual defence of the kingdom, it was deemed expedient to mature a system which should provide for the permanence and security of shipping above all other things; which should obtain for British vessels a decided preference in all quarters of the world; which should give to our own docks, our own shipwrights, and artificers, advantages heretofore shared with others, and which should communicate to the public and the state such precise information with respect to the extent and nature of this kind of property as effectually to prevent foreigners from becoming engaged in it to the hazard of so many important interests. The 26 Geo. III. c. 60., was therefore passed, and followed up by other acts of amendment and improvement.

The public are indebted for this act, or rather the system of which this act was the foundation, to the industry and ability of the late Earl of Liverpool, a nobleman, who, without ostentation, did more to uphold the maritime predominance of this country than almost any man who has preceded, or followed him. According to this act, every British vessel now effectually sails under a specific licence, which is granted to her by the appointed officer, upon the verification of her being British built, and possessing all the other qualifications which the law requires; and which licence, on the other hand, is refused if she have not complied with the conditions of the law. The great object of our navigation laws, as we have before had occasion to remark, is to confine our trade to our own mariners and shipping; to ships, the property of our own merchants, and the built of our own country. The object of the registry acts is to second and enforce this national purpose, by compelling every vessel claiming to be British, to make an enrolment of her name, tonnage, property and built, that she may every moment, and invariably, be before the public eye, and that foreigners may be prevented from having any interest in her. The policy of these acts may not be at first perceived. The proper point under which they are to be considered is that of completing the system of our navigation laws; an object which they effect by bringing its principal subjects, ship-owners, ships, and sailors, under the distinct view of the law, and by the registration of every act of transfer, effectually preventing those opportunities of evasion which would follow by a confusion of identity.

(z) Reeves, 403.

But in the developement of the registry system which we are now about to subjoin, we shall consider all the statutes relating thereto (as well those which preceded the 26 Geo. III. as those which follow it) as if consolidated into one system; and distribute the law of registration, as it now exists, into the several heads into which the order of these statutes has cast it.

And, first, as to the ship.

No ship built out of His Majesty's dominions entitled to the privileges of a British ship.

No ship or vessel, foreign-built, except prizes legally condemned, nor any ship built or rebuilt upon a foreign keel, or bottom, although owned by British subjects and navigated according to law, shall be entitled to any of the privileges of a British-built, or a British-owned ship;

such privileges to be confined to such ships only as are wholly of the built of Great Britain, Ireland, Guernsey, Jersey, or the Isle of Man, or of the British colonies, plantations, &c. It is provided, however, that foreign ships, built before May, 1786, and which wholly belong to any of the people of Great Britain, &c., or of any of the colonies, plantations, &c., as the right owners thereof, and navigated according to law, and registered in the manner hereinafter directed, shall continue to enjoy the privileges they have hitherto enjoyed, and to import and export goods under the accustomed regulations. And ships, which before the passing of the 26 Geo. III. were built or rebuilt upon any foreign bottom or keel, and duly registered as British ships, are to continue to enjoy the privileges to which they were previously entitled. It is provided likewise, that no ship which shall have begun to be repaired or rebuilt before the 1st of May, 1786, shall be prevented from being registered according to this act, by an order under the hands of the commissioners of the customs in England, &c. or of the commissioners of the customs in Scotland, &c., which order the commissioners are empowered to grant, if it shall be made appear to their satisfaction on oath, that such ship was stranded by the act of Providence, and not with a fraudulent intent, and was at the time of being so stranded the sole property of foreigners; or that such ship was a droit of admiralty; and provided it be in like manner ascertained that the said ship, from the damage which she has received by stranding, was rendered unfit to proceed to sea, without undergoing a thorough repair in this kingdom; and that she was necessarily sold for the benefit of the foreign owners; or, as a droit of admiralty, under the authority of the Court, and fairly and openly purchased by a British subject; and that, being the sole property of a British subject, she has been so much repaired that two-thirds of her at least are of British built. (*a*)

Proviso for foreign ships, built before 1st May, 1786.

(*a*) 26 Geo. III. c. 60. s. 1.

No ship rebuilt, or whose repairs *exceed* 15*s.* per ton, in a foreign port, to be deemed British-built, unless in case of extraordinary damage.

2. No ship or vessel to be deemed or taken to be British built, or to enjoy the privileges thereunto belonging which shall be rebuilt or repaired in any foreign port or place, if such repairs shall exceed the sum of 15*s.* for every ton of the said ship or vessel, according to the admeasurement thereof, unless such repairs shall be necessary by reason of extraordinary damage, to enable her to perform the voyage in which she is then engaged, and to return in safety to some port of His Majesty's dominions. In such case, before such vessel is repaired, so as to exceed the sum of 15*s.* per ton, the master, or other person having charge of the vessel, is to report her state and condition, upon oath, to the British consul, or other chief British officer, if there be such consul or officer at the port where it shall be necessary to repair such ship, and shall cause her to be surveyed by two persons approved by such consul or officer, and shall deliver to such consul or officer in writing the particulars of the damage sustained by such ship, and shall verify upon oath the particulars and amount of such repairs; and that the same were become necessary in consequence of damage sustained during the voyage to that port, to enable the vessel to prosecute her intended course, and to return to some port or place of His Majesty's dominions, which the said consul or chief officer is required to certify under his hand and seal. If there be no consul or officer resident at the port where the repairs are necessary, the survey is to be made by two known British merchants residing at or near the port. The master is to produce to them the vouchers of the particulars, and the amount of the repairs; and their certificate of them is to be of equivalent force with the certificate of the consul or chief officer. The expenses of the ship's repairs are to be certified on her arrival, before the collector or comptrollers of the customs at the port where she first arrives; and if they shall exceed 15*s.* per ton, and the master shall refuse to deliver to the collector and comptroller the certificate which he is required to produce, the

Particulars of damage sustained to be delivered to the consul or chief British officer, and the necessity of the repairs to be certified.

ship is to be deemed foreign built to all intents and purposes whatsoever. (*a*)

Ships captured and re-captured.

3. No British-built ship captured by the enemy shall be registered as a British-built ship, or enjoy any of the privileges thereof; but, though owned by a British subject, shall be deemed a foreign ship. (*b*) But if recaptured by any of His Majesty's ships of war, or by ships in alliance with this country, she may be registered, and shall be deemed to have all the privileges of a British-built ship, the same as if she had not been captured by the enemy. (*c*)

Subjects residing in foreign parts, not to be owners of British ships.

4. No subject of His Majesty, whose usual residence is in a country not under the dominions of His Majesty, shall be entitled (during the time he shall continue so to reside) to be the owner, in whole or in part, of any British ship required to be registered, unless he be a member of some British factory, or agent for a partner in any house of co-partnership actually carrying on trade in Great Britain

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(*a*) 26 Geo. III. c. 60. s. 2., and see *ante*, Ch. II. p. 71, 72.

(*b*) 48 Geo. III. c. 70.

(*c*) 49 Geo. III. c. 41. The former act had declared, that British ships captured by the enemy, which should afterwards become the property of British subjects, should not be entitled to the privilege of British ships. But this act being deemed harsh, and in some degree discouraging the recapture of ships taken by the enemy, the 49 Geo. III. c. 41. was passed to amend it. The 45 Geo. III. c. 72, passed for the encouragement of seamen, and more effectually manning His Majesty's navy, had enacted that prize vessels legally condemned in the Court of Admiralty should, to all intents and purposes whatsoever, be deemed British-built, being first duly registered according to the provisions of 26 Geo. III. c. 60. The 49 Geo. III. c. 34. permitted the Governor of Malta to make registry of vessels condemned there as prize, and to grant certificates thereof, under such regulations as governors residing in any colony might do by 26 Geo. III. c. 60. Such registries were to be as valid as if made in Great Britain; and ships so registered, owned by natives of Malta, were permitted to be navigated as British prize ships to Great Britain, &c. But copies of such certificates of registry were to be transmitted to the custom-house in London. See *post*. As to the Registration of Prize Ships.

Foreigners not to purchase shares in British ships, without the consent of the owners of three-fourth parts in value.

or Ireland.(*d*) And no foreigner or other person, not being a natural born subject of His Majesty, shall be entitled to, or shall purchase or contract for, any part or share of any British ship belonging only to the natural born subjects of His Majesty, without first obtaining the consent, in writing, of the owners of three-fourth parts in value at least of such ship, to be indorsed on the certificate of the registry of such ship, before two witnesses; and all agreements and contracts by foreigners for any part or share in a British vessel, without such consent, indorsed as aforesaid, are declared null and void.

Of ships which are required to be registered.

5. The act then proceeds to require a registry of every merchant ship, and prescribes certain forms upon the transfer of property therein. Every ship having a deck, or of the burthen of fifteen tons or upwards, belonging to any of His Majesty's subjects in Great Britain, Guernsey, Jersey, the Isle of Man, and any of the colonies, plantations, or territories, in Asia, Africa, and America, in the possession of His Majesty, shall be registered; and persons claiming property therein must obtain a certificate of registry from the collector or comptroller of customs in Great Britain, or from the governor or other chief officer, in Guernsey, Jersey, or in any of the said plantations. But no ship of war, or vessel belonging to the Royal Family is required to be registered, or any lighters, barges, boats, &c. or vessels used in inland navigation; and no vessel, not exceeding thirty tons, and not having a whole or fixed deck, employed in the Newfoundland fishery, or in the coasting trade in the North American colonies.(*e*)

Where registry is to be made.

6. No registry is to be made, or certificate thereof granted, in any other port or place than the port or place

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(*d*) 26 Geo. III. c. 60. sect. 8. & 13 Geo. III. c. 26.

(*e*) 26 Geo. III. c. 60. sect. 3. & 6 & 27 Geo. III. c. 19. sect. 8.—For the form of registry, see the Act in the Appendix.

to which the vessel belongs, (except for prizes condemned at Guernsey, Jersey, &c. which are to be registered in a special manner,) or unless by an express authority from the commissioners of the customs. And the port to which a vessel is to be deemed and taken to belong, is declared to be the port from and to which such vessel shall usually trade; or, being a new ship, shall intend so to trade, and at or near which the husband, or acting and managing owner, usually resides. (*f*)

Port to which a vessel belongs.

7. Before a registry is made, an oath must be taken by the owner, if the ship be owned by one person; or if owned by two, then by both, if both be resident within twenty miles of the port where the register is required; or by one, if one or both of them shall be resident at a greater distance from such port or place. But, if the number of the owners exceed two, then the oath must be made by the major part, if the greater number of them be resident within twenty miles of such port or place, not in any case exceeding three of such owners; or by one of such owners, if all shall be resident at a greater distance.

Of the oath to be made before registry granted.

THE FOLLOWING IS THE OATH REQUIRED TO BE TAKEN.

" I, A. B. [place of residence and occupation,] do make oath, that the ship or vessel [name] of [port or place,] whereof [master's name] is at present master, being [kind of built, burthen, &c. as described in the certificate of the surveying officer,] was [when and where built, or if prize, capture and condemnation,] and that I, the said A. B. [and the other owners, names and occupations, (if any) and where they respectively reside, viz. town, place, or parish, and country, or if member of, and resident in, any factory in foreign parts, or in any foreign town or city, being an agent for, or partner in, any house or co-partnership, actually carrying on trade in Great Britain or Ireland, the name of such factory, foreign town or city, and the names of such house or co-partner-

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(*f*) 26 Geo. III. c. 60. sect. 4, 5.

ship,] am [or are] sole owner [or owners] of the said vessel, and that no other person or persons whatever hath or have any right, title, interest, share, or property therein, or thereto; and that I, the said A. B., [and the said other owners, if any,] am [or are] truly and bonâ fide a subject [or subjects] of Great Britain; and that I, the said A. B., have not [nor have any of the other owners, to the best of my knowledge and belief,] taken the oath of allegiance to any foreign state whatever [except under the terms of some capitulation, describing the particulars thereof,] or that since my taking [or his, or their taking] the oath of allegiance to [naming the foreign states respectively to which he, or any of the said owners shall have taken the same,] and prior to the passing of an act in the twenty-sixth year of the reign of King George the Third, (intituled, An Act for the further Increase and Encouragement of Shipping and Navigation,) I have [or he, or they, hath, or have] become a subject [or subjects] of Great Britain [either by His Majesty's letters patent, as a denizen, or denizens, or naturalized by act of parliament, as the case may be, naming the dates of the letters of denization, or the act or acts of parliament for naturalization respectively,] or [as the case may be,] I have or he, or they, hath, or have] become a denizen [or denizens, or naturalized subject or subjects, as the case may be,] of Great Britain, by His Majesty's letters patent, or by an act of parliament, passed since the first day of January, one thousand, seven hundred, and eighty-six, [naming the times when such letters of denization have been granted respectively, or the year or years in which such act or acts for naturalization have passed respectively,] and that no foreigner, directly or indirectly, hath any share, or part, or interest in the said ship or vessel."—Sect. 10.

It is provided, however, by 27 Geo. III. c. 19. sect. 4. that no oath taken to acquire a temporary residence in a foreign state is to be deemed an oath of allegiance to such state.

Of the oath where the owners exceed three, or

8. If the number of joint owners exceed three or more, and three shall not personally attend to take the oath, then such owners as shall attend shall make *further* oath, that

the part owners then absent are not resident within twenty miles of the port or place of registry, and have not wilfully absented themselves, or are prevented by illness from attending.(*g*) If the ship belong to the East India Company, or other body corporate, the oath may be taken by the secretary or other officer authorized by them.(*h*) And ships built in North America for European owners may be registered there, on the oath of their principal, husband, or agents. But such ships, so registered, must, notwithstanding, be registered *de novo* upon their arrival in any port in His Majesty's European dominions, upon the oath of the owners, and according to the requisites of the 26 Geo. III. c. 60 (*i*).

the ship belongs to a body corporate, or be built in North America for European owners.

9. Previous to the registering or granting any certificate of registry, the ship is to be examined by some persons skilled in the building or admeasurement of ships, appointed by the commissioners of the customs, or by the governor, &c. of any of the colonies or plantations. They are to examine her as to every particular contained in the form of her certificate, and are to deliver a true account, in writing, of her built, description, and admeasurement, to the person making the registry; and the master and person, who shall be appointed for that purpose, or attend on the part of the owners, shall sign his name to the certificate of such surveying or examining officer, in testimony of the truth thereof, provided he shall agree to the particulars therein described.(*k*)

Examination of ships before the registry.

10. Persons giving false descriptions of any of the particulars required to be contained in the registry, or wilfully making false registers, are to forfeit, upon conviction, 100*l*. and to be incapable of holding any office or employment under His Majesty.(*l*)

Of the penalties for false descriptions and registers.

(*g*) 26 Geo. III. c. 60. sect. 11.

(*h*) 27 Geo. III. c. 19. sect. 5.—The act gives the form of the oath.

(*i*) 27 Geo. III. c. 19. sect. 9.

(*k*) 26 Geo. III. c. 60. sect. 12.

(*l*) Idem, sect. 13.

Of ascertaining the tonnage of vessels when afloat.

11. A method is then prescribed of ascertaining the tonnage of vessels when afloat, (*m*) *viz.* drop a plumb-line over the stern of the ship, and measure the distance between such line and the after part of the stern-post, at the load water mark; then measure from the top of the said plumb-line, in a parallel direction with the water to a perpendicular point, immediately over the load water mark, at the fore part of the main stem; subtracting from such measurement the above distance, the remainder will be the ship's extreme length, from which is to be deducted three inches for every foot of the load draughts of water, for the rake abaft, and also three-fifths of the ship's breadth, for the rake forward, the remainder shall be esteemed the just length of the keel, to find the tonnage; and the breadth shall be taken from outside to outside of the plank, in the broadest part of the ship either above or below the main wales, exclusive of all manner of sheathing or doubling that may be wrought upon the side of the ship; then multiplying the length of the keel for tonnage by the breadth so taken, and that product by half the breadth, and dividing by ninety-four, the quotient shall be deemed the true contents of the tonnage, provided always, that nothing herein-before contained shall in anywise be construed to alter the manner of admeasuring the tonnage of any ship or vessel, which has heretofore been practised for the purpose of ascertaining the like duties, or any other duties or imports whatever; payable according to the tonnage of any ship or vessel.

Bond not to lend certificates, but to return them.

12. At the time of obtaining the certificate of registry, a bond is to be given by the master and such of the owners as personally attend, in a penalty (which varies according to the description of the vessel,) that the certificate shall not be sold, lent, or otherwise disposed of, to any person; and that it shall be solely made use of for the service of the ship for which it is granted; and that in case the ship

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(*m*) 26 Geo. III. c. 60. sect. 14.

shall be lost, taken by the enemy, burnt, or broken up, or otherwise prevented from returning to the port to which she belongs, the certificate, if preserved, shall be delivered up within one month after the arrival of the master in any port or place within His Majesty's dominions, to the collector and comptroller of the customs, &c. or other proper officer; and if any foreigner, or any person for his use or benefit, shall purchase, or otherwise become entitled to the whole, or any part, or share of, or any interest in, such ship, and the same shall be within the limits of any port in Great Britain, Guernsey, Jersey, Isle of Man, or the British colonies, plantations, &c., then the certificate of registry shall, within seven days after the purchase or transfer of property, be delivered up to the person authorized to make registry at such port; and if such ship shall be in any foreign port when such transfer of property shall take place, then that the same shall be delivered up to the British consul or other chief British officer resident at, or nearest to, such foreign port; or, if such ship shall be at sea when such transfer of interest or property shall take place, then that the same shall be delivered up to the British consul or chief British officer at the foreign port or place, in or at which the master shall first arrive, after such purchase or transfer of property at sea, immediately after his arrival at such foreign port. But if the master shall arrive at a port in Great Britain, &c. or in any port of the plantations or colonies, then the same shall be delivered up in manner aforesaid, within fourteen days after the arrival of the ship in port. And if the ship have any Mediterranean pass, such pass is to be delivered up at the time of the certificate to the person authorized to receive such certificate; such pass to be transmitted to the Commissioners of the Admiralty, to be cancelled; and such certificate to be transmitted to the commissioners of the customs.(*n*)

Mediterranean pass to be delivered up with certificate.

(*n*) Sect. 15. By 27 Geo. III. c. 19. sect. 6. & 7. the bond may be taken before any such persons as the commissioners of the

Of the indorsements required to be made on an alteration of the property of the ship in the same port, by 26 Geo. III. c. 60. s. 16.

13. The provisions of 7 & 8 W. III. as to indorsements on certificates of registry upon any alteration in the pro-

customs, or the governors of plantations, &c. may choose to appoint, and in such manner as they shall deem expedient; and such bond is to be of the same effect as if taken by persons authorized to make the registry of the ship. And upon the change of the master of any ship, the person who shall become master shall give a fresh bond.

The nature of a Mediterranean pass is this:—in the treaties that have from time to time been made with the different Barbary States, it has been agreed, that the subjects of the king of Great Britain should pass the seas unmolested by the cruizers of those states; and, for better ascertaining what ships and vessels belong to British subjects, it is provided that they shall produce a *pass*, under the hand and seal of the Lord High Admiral, or the Lords Commissioners of the Admiralty. In pursuance of these treaties passes are made out at the Admiralty, containing a very few words, written on parchment, with ornaments at the top, through which a scolloped indenture is made; the *scolloped tops* are sent to Barbary, and being put in the possession of their cruizers, the commanders are instructed to suffer all persons to pass who have passes that will fit these scolloped tops. The protection afforded by these passes is such, that no ships which traverse the seas frequented by these rovers, ever fail to furnish themselves with them; whether in the trade to the East Indies, Africa, or the Levant, or in the trade to Spain, Italy, or any part of the Mediterranean; and from the more particular need of them in the latter, they, no doubt, obtained the name of *Mediterranean passes.* For the accommodation of merchants in distant parts, blank passes, signed by the Lords of the Admiralty, are lodged with the governors abroad, and with the British consuls, to be granted to those who comply with the requisites necessary for obtaining them. As this piece of security is derived wholly from the stipulations made by the Crown with a foreign power, the entire regulation and management of it has been under the direction of His Majesty, who, with the advice of his Privy Council, has prescribed the terms and conditions upon which these passes shall be granted. Among others are the following: they are to be granted for none but British-built ships, or ships made free, navigated with a master and three-fourths of the mariners British subjects, or foreign Protestants made denizens. Bond is to be given, in the sum of three hundred pounds if the vessel is under one hundred tons, and in five hundred pounds if it is of that or more, for delivering up the pass within twelve months, unless in the case of ships trading from one foreign port to another; and such passes need not be returned in less than perty of a ship in the port to which she belongs, being found insufficient, it is further provided by the act, (the leading provisions of which we are detailing,) that in addition to the indorsement required by the act of William, there shall also be indorsed on the certificate of registry, before two witnesses, the town, place, or parish, where the persons to whom the property in the ship, or any part thereof, shall be so transferred, shall reside; or if such person usually reside in any country not under the dominion of His Majesty, but in some British factory, the name of such factory, of which such person is a member, must be expressed; or if such person reside in any foreign town or city, and is not a member of any British factory, the name of such foreign town or city must be mentioned; and also the name of the house or co-partnership in Great Britain for or with whom such person is an agent or partner; and the person to whom the property in such vessel is transferred is required to deliver a copy

three years. The rules and orders under which Mediterranean passes were lately granted were made by the King in council, on the 14th of June, 1722, and on the 28th of August, 1776, upon representations made by the Board of Admiralty of the abuses then practised. It has been found expedient at the conclusion of a war, and sometimes during peace, to recall and cancel all passes that have been issued, and to issue others in a new form. This has been done for two reasons; first, that these useful instruments, by various means, either accidental or fraudulent, came into the hands of foreigners, who, under cover of them, carried on, in security, a trade which otherwise would have belonged to British subjects, and which had been purchased by the Crown at the expence of keeping up this sort of alliance. Secondly, that the Barbary States complained that, adhering to the rule of fitting the other part of the indenture to the passes, they were obliged to suffer ships to pass that did not belong to British subjects. For these reasons, the passes were called in, in the years 1722, 1729, 1750, 1765, 1776, 1783, and for the last time, we believe, at the conclusion of the late war. By stat. 4 Geo. III. c. 13. it is made felony, without benefit of clergy, to forge, counterfeit, or alter the Mediterranean passes; and such offences committed out of the kingdom may be prosecuted in any country.—Reeves on Shipping, p. 406, 407.

of such indorsement to the officer making the registry, who is to cause an entry thereof to be indorsed on the oath or affidavit upon which the original certificate of registry was obtained; and also to make a memorandum in the book of registers, and to give notice to the commissioners of the customs. But the provisions in the above clause of 26 Geo. III. c. 60. sect. 16., not being deemed sufficient, the legislature subsequently directed that

A certain form of indorsement on the change of property in a ship in the port to which she belongs, directed by 34 Geo. III. c. 68. sect. 15.

14. Upon any alteration of property in any ship in the port to which she belongs, an indorsement is to be made on the register according to a form given by 34 Geo. III. c. 68. sect. 15.(*o*) to be signed by the person transferring the property, or by some person legally authorized for that purpose, and a copy of such indorsement is to be delivered to the person authorized to grant the registry; otherwise such sale or contract, &c. to be void. An entry thereof to be indorsed on the affidavit on which the original certificate was obtained; a memorandum to be made in the book of registers, and notice given to the commissioners of customs. (*p*)

Certificate to be accurately recited in the bill of sale of a ship, and no transfer, either of whole or part, valid, unless in writing.

15. Upon the transfer of the property in any ship from one of His Majesty's subjects to another, in whole or in part, the certificate of the registry of the ship is to be truly and accurately recited in words at length in the bill or instrument of sale; otherwise such bill or instrument

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(*o*) FORM OF INDORSEMENT IN CHANGE OF PROPERTY.

Be it remembered, that [I, or we,] [*names, residence, and occupation of the persons selling,*] have this day sold and transferred all [my *or* our] right, share, or interest in and to the ship or vessel [*name of the ship or vessel,*] mentioned in the within certificate of registry, unto [*names, residence, and occupation of the purchaser.*] Witness [my, *or* our hand or hands,] this [*date in words at full length.*]

Signed in the presence of
[Two witnesses.]

(*p*) See likewise 42 Geo. III. c. 61. sect. 17. as to Ireland.

of sale to be null and void to all intents and purposes. (*q*). And no transfer, or contract, or agreement for a transfer of property in any ship, is to be valid for any purpose either in law or equity, unless such transfer be by bill of sale or instrument in writing, containing the recital of the register in words at length. (*r*)

Of vessels absent from port when alterations in property made.

16. Provision is then made for the sale of vessels, either in whole or part, when absent from port. If a ship shall be at sea, or absent from the port to which she belongs, at the time when such alteration in her property shall be made, (rule 14.) so that an indorsement or a certificate cannot be immediately made, the sale or contract, or agreement for sale, shall, notwithstanding, be made by a bill of sale or other instrument, in writing, as before directed, and a copy of such bill of sale, or other instrument, in writing, shall be delivered, and a copy of such bill of sale or other instrument, in writing, and an entry thereof shall be indorsed on the oath or affidavit, and a memorandum thereof shall be made in the book of registers, and notice of the same shall be given to the commissioners of the customs; and within ten days after such ship shall return to the port to which she belongs, an indorsement shall be made and signed by the owner, or some person legally authorized for that purpose, and a copy thereof shall be delivered in manner hereinbefore mentioned. Otherwise, such bill of sale, or contract, or agreement for sale thereof, is declared to be utterly null and void to all intents and purposes whatsoever; and entry thereof shall be indorsed, and a memorandum thereof made, in the manner hereinbefore directed. (*s*)

Regulations on transfer of property where owners reside in any country not under the dominion of His Majesty.

17. But in all cases where the owner of any ship shall reside in any country not under the dominion of His Ma-

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(*q*) 26 Geo. III. c. 60. sect. 17. as to Ireland.

(*r*) 34 Geo. III. c. 68. sect. 14. and 42 Geo. III. c. 61. sect. 16.

(*s*) 34 Geo. III. c. 68. sect. 16. 42 Geo. III. c. 61. sect. 18.

jesty, as member of some British factory, or agent for, or partner in, any house or co-partnership actually carrying on trade in Great Britain or Ireland, at the time when he shall transfer such property in any ship or vessel, so that an indorsement cannot be made immediately, nor a copy of such bill of sale or other instrument in writing be delivered, nor an entry thereof indorsed on the oath or affidavit, nor a memorandum thereof made in the book of registers, nor notice of the same be given to the commissioners of the customs, in the manner before mentioned, the same may be done at any time within six months after such transfer shall have been made; and that within ten days after such owner, or some person legally authorized for that purpose by him, shall arrive in this kingdom, if such ship shall then be in any port of this kingdom; and if not, then within ten days after such ship shall so arrive, an indorsement shall be made by the owner, or some person legally authorized for that purpose, and a copy thereof shall be delivered in manner hereinbefore mentioned, otherwise such bill of sale, or contract, or agreement for sale, is declared to be utterly null and void, to all intents and purposes whatsoever, and entry thereof shall be indorsed, and a memorandum thereof made, in the manner hereinbefore directed. (*l*)

Where the property is transferred by sale, no ship is to be registered *de novo*, unless the instrument of sale is produced.

18. When the property in any ship belonging to His Majesty's subjects shall by sale be transferred in whole or in part to any other of His Majesty's subjects, and such ship shall be required to be registered *de novo*, the officer empowered to make registry may require the bill, or instrument of sale, to be produced: and in case such bill or instrument shall not be produced, the officer shall not grant a certificate of registry *de novo*, but the commissioners of the customs and the governor, lieutenant-governor, or commander in chief of Guernsey, Jersey, or of any British plantation, if application shall be made to any

(*l*) 34 Geo. III. c. 68. sect. 17.

of them, upon due consideration of the case, may give directions for registering such ship *de novo,* notwithstanding such bill or instrument of sale shall not have been produced, provided all other regulations required by law be complied with. (*u*)

Commissioners of customs may give directions for registry.

19. The statute of 7 & 8 Will. as we have before shewn, was only intended to prevent frauds and abuses in the plantation trade; but it was the policy of the new registry acts to amend and improve the provisions of that statute, and to extend and apply them to all merchant-ships whatever, exceeding a certain tonnage. The act of William permitted part-owners, upon a transfer of property, and a change of partnership, to require of the proper officer a registry *de novo* of the ship, instead of an indorsement on the old registry. The 26 Geo. III. c. 60., had not directed a new registry to be made in such cases, and therefore such registers could only be granted under the former statute. In order to meet this case, the 34 Geo. III. c. 68., enacts, that when there shall be any alteration of property in the same port, by the sale of one or more shares in any ship, after registering thereof, and the owners who were owners thereof at the time such ship was last registered, or whose property therein has not been so transferred, shall be desirous of having the ship registered *de novo,* the officers may register such ship *de novo,* provided all the requisites of the laws concerning the registry *de novo* be complied with. (*v*)

On alterations of property in the same port, the owners whose property is not transferred, may have the ship registered *de novo.*

20. The law had already declared, that British ships, the property of which was in whole or in part transferred to persons not being subjects of His Majesty, should not be entitled to the privileges of British vessels; and to prevent frauds in the employment of such ships, *as* British ships, contrary to the intention of the laws of navigation, they were required in certain cases to be registered *de novo.*

As soon as the transfer of property in a ship at sea is known to the master, he must proceed direct to a port where she may be registered *de novo;*

(*u*) 34 Geo. III. c. 68. sect. 20.

(*v*) Sect. 21.

on failure whereof she is to be deemed foreign, and not again registered, unless by special order.

In the event of such transfer of property, which was frequently made by the owners whilst the ship was at sea, the 34 Geo. III. c. 68., directs that the most diligent notice should be given to the proper officers of the customs. It directs, in terms, that as often as any transfer of property in any ship shall be made while upon the sea, on a voyage to a foreign port, in case the master is privy to such transfer, or in case he is not, as soon as he shall become acquainted therewith, such ship shall proceed directly to the port for which the cargo is destined, and shall sail from such port to which the cargo then on board is destined, to the port of His Majesty's dominions to which she belongs, or any other port in which she may be registered, and may take on board, in the port for which her original cargo was destined, or other port, being in the course of her voyage to the port in which she may be registered *de novo*, such cargo as shall be destined, and may be legally carried to the port where she may be registered *de novo;* and if such transfer shall be made while such ship is in any foreign port, and the master is privy to such transfer, or in case he is not, as soon as he shall become acquainted therewith, such ship, after having delivered the cargo, shall sail from such port, to the port to which she belongs, or to any other such port in which she may be registered, and may take on board at the port to which her original cargo was destined, or other port, being in the course of her voyage to the port in which she may be registered *de novo*, such cargo as shall be destined and may be legally carried to such port where she may be registered *de novo*, and if such transfer shall be made while such ship is on a fishing voyage, and the master of such ship is privy to such transfer, or in case he is not, as soon as he shall become acquainted therewith, such ship, after having finished fishing, without touching at any foreign port, except for repairs or refreshments, or for delivering any part of the cargo, shall sail to the port to which she belongs, or any other port where she may be registered, and may take on board at the foreign port last described, or any other port, being in the course of her voyage to the port where she may be registered *de novo*, such cargo as shall be destined and may be legally carried to such port; and such ship shall be registered *de novo* as soon as she returns to the port to which she belongs, or to any other port in which she may be registered; on failure whereof such ship shall, to all intents and purposes, be deemed to be a foreign ship, and shall not again be registered, or entitled to the privileges of a British ship, unless the commissioners of the customs, or the governor, lieutenant-governor, or commander in chief of Guernsey, or Jersey, or of any British plantation, shall, on consideration of the special circumstances of the case, think fit to order the said ship to be registered: provided that the regulations required by the laws in force concerning the first registry of ships shall be complied with; and provided also, that in no case of the transfer of property, in whole or in part, the ship shall be registered *de novo*, unless she shall return to the port to which she belongs, or to such port in which she may be registered *de novo*, within twelve months after the date of such transfer, if such ship shall not be on a voyage to the east of the Cape of Good Hope, or to the west of Cape Horn; or within two years, if the ship be on a voyage to the east of the Cape of Good Hope, or to the west of Cape Horn, at the time of such transfer taking place; except by order of the commissioners, or governor, as aforesaid, upon special representation of the circumstances of the case, in manner before authorised. (*x*)

Change of masters to be endorsed on the certificate, and memorandum made in the book of registers.

21. And in order to prevent frauds, and the employment of the vessel in illicit trade, it is deemed expedient that the name of the master of a British ship should always be known at the custom-house, and that upon any change of masters immediate notice should be given to the proper officers. One of the clauses, therefore, of the 26 Geo. III. c. 60., directs, that as often as the master of any ship

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(*x*) 34 Geo. III. c. 68. sect. 22.

registered shall be changed, the master or owner shall deliver to the persons authorized to make registry, at the port where such change shall take place, the certificate of registry, who shall thereupon endorse and subscribe a memorandum of such change, and forthwith give notice of the same to the proper officer of the port where such ship or vessel was last registered, who shall likewise make a memorandum of the same in the book of registers, and forthwith give notice thereof to the commissioners of the customs. (*y*)

No change to be made in the name of ships, which, together with their ports, must be conspicuously painted on the ship's stern.

22. We have already seen that the statute of 7 & 8 Will. III. had provided that ships should not change their names without registering *de novo*. This restriction, however, appears to have been confined to vessels engaged in the plantation trade. But in order effectually to prevent the frauds which were practised by changing the name of a ship, and more especially among illicit traders, the 26 Geo. III. enacts, that no owner of any ship shall give any name to such ship, other than that by which she was first registered; and the owner of every ship which shall be so registered, shall, within one month from the time of such registry, cause to be painted in white or yellow letters, of a length not less than four inches, upon a black ground, on some conspicuous part of the stern, provided there shall be sufficient space for the purpose, but if not, then in letters as large as such space will admit, the name by which such ship shall have been registered, and the port to which she belongs, in a distinct and legible manner, and keep and preserve the same: and if such owner or master shall wilfully alter, erase, obliterate, hide, or conceal, or cause, or procure, or permit the same to be done, (unless in the case of square-rigged vessels in time of war,) or shall, in any written or painted paper, or other document, describe such ship by any name other than that by which she was first registered, or shall verbally describe, or cause, or procure, or permit such ship to be described by any other

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(*y*) 26 Geo. III. c. 60. sect. 19.

name to any officer of the revenue, such owner or master shall forfeit 100*l*. (*z*)

Persons applying for certificates in Great Britain, &c. are to produce a particular account of the ships from the builders, and to make oath to their identity.

23. Every person who shall apply for the certificate of the registry of any ship in Great Britain, Guernsey, Jersey, or the Isle of Man, is required to produce to the person authorized to grant such certificate a true and full account, under the hand of the builder of such ship, of the proper denomination, and of the time when, and the place where such ship was built; and also an exact account of the tonnage of such ship, together with the name of the first purchaser, (which account the builder is required to give under his hand, to the person demanding it for the purpose of applying for a certificate of registry) and he is also required to make oath that the ship for which the certificate is required is the same as that described in the builder's account; (*a*) and persons making application in the colonies, for the like certificates, are required to conform to the above particulars. (*b*)

If certificates are lost, new ones to be granted, upon security given and oath taken, according to 15 Geo. II. c. 3. & 26 Geo. III. c. 60. s. 10.

24. We have already detailed (*c*) the provisions made by the 15 Geo. II. c. 31. sect. 2., when the certificate was lost, and the ship was in the plantations. Upon a certain oath being made by the master, and security given, the governor of the colony or plantation, where the loss was alleged to have happened, was empowered to grant a certificate to entitle the vessel to trade for one voyage only; and after the exigency of a single voyage was provided for, upon the loss of the certificate being proved by the master, and security given by him and one of the owners, the ship was permitted to be registered *de novo*. The 26 Geo. III. c. 60. sect. 22. adopts this provison of the 15 Geo. II., and extends it to all cases of certificates lost, without confining it to the plantation trade; but instead of the oath prescribed by the 15 Geo. II., it requires that

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(*z*) 26 Geo. III. c. 60. sect. 19.

(*a*) Sect. 20.

(*b*) Sect. 21.

(*c*) See *ante*.

an oath shall be taken as directed by the tenth section, that is, the like oath which is required to be made before a ship is registered, or a certificate granted by virtue of that act. (*d*)

Ships altered to be registered anew, or deemed foreign.

25. It was a great object within the policy of the registry acts to prevent any confusion in the identity of a ship; it was therefore enacted, that if any ship, after she shall have been registered, should, in any manner whatever, be altered in form or burthen, by being lengthened, or built upon, or should be altered from a sloop to a brigantine, or from any one denomination of vessel to another, by the mode or method of rigging or fitting, in such case she should be registered *de novo*, upon her return to the port to which she belonged, or to any other port in which she might be legally registered; otherwise she was to be deemed and taken to be a foreign ship. (*e*)

The condemnation of prizes, and the particulars of the vessels, &c. must be produced, to entitle the owner to a certificate of registry.

26. And in order to prevent frauds in the obtaining of registers for vessels represented to be prizes, it is provided by these acts, that upon registering vessels condemned as prizes, the owners, before they shall be entitled to a certificate of registry, shall produce to the proper officer of the customs a certificate of condemnation, under the hand and seal of the Judge of the court in which the ship has been condemned; (*f*) and a true and exact account in writing of all the particulars of the ship, (which are required by the third section of the 26 Geo. III. c. 60.) to be made and subscribed by some skilful person appointed by the Court to survey the ships. Oath must likewise be made that the ship is the same ship which is mentioned in the certificate of the Judge of the Court of Admiralty. (*g*) The act then provides, that prizes condemned in Guernsey, Jersey, or the Isle of Man, shall be registered at Southampton. (*h*)

(*d*) 26 Geo. III. c. 60. sect. 10.

(*e*) Sect. 24.

(*f*) The act authorizes the Judge to grant such certificate.

(*g*) 26 Geo. III. c. 60. sect. 25.

(*h*) Sect. 26.

27. In all cases where a ship, condemned as prize in any of His Majesty's colonies, shall be registered and obtain a certificate of registry, an exact and particular account must be subjoined to the certificate, of the sum for which such vessel has been sold, to be verified on the oath of the person applying for such registry and certificate.(*i*)

The sum on oath for which a prize sold in the colonies, to be subjoined to the certificate.

28. The certificate is next to express whether the ship be of the built of Great Britain or Ireland, Guernsey, Jersey, the Isle of Man, or of the colonies, plantations, islands, or territories belonging to His Majesty, or of any foreign country; and shall, if British built, be entitled to a "*certificate of British Plantation registry*;" and, if foreign built, shall be entitled to a "*certificate of foreign ship's registry, for the European trade, or British property*," as the case may be. (*k*)

Other particulars to be expressed in a certificate.

29. The master of every ship, which shall have procured a certificate of the registry, is required upon demand to produce such certificate to the principal officers of every port in His Majesty's dominions, or to the British consul or chief British officer in any foreign port in which such ship shall arrive, for the inspection of such officer or officers, British consul, or chief British officer, in order to satisfy him or them that she has been properly registered under the penalty of 100*l.* s. 34.

Certificates of registry are to be produced upon demand, at every port.

30. The certificate is then made a public document, always to be present with the ship, in the nature of a protection and licence; and the master of every ship which shall have procured a certificate of the registry, is re-

Certificate of registry to be produced at every port.

(*i*) 26 Geo. III. c. 60. s. 27. The object of this clause was to facilitate the levy of the duties payable upon the arrival of the ship in the first British port.

(*k*) S. 28. The 29th, 30th, 31st, 32d and 33rd sections of this act apply to ships in existence at the passing of the act. The subject matter of these sections, therefore, has ceased to be of interest in a general treatise.

quired upon demand to produce such certificate to the principal officers of every port in His Majesty's dominions, or to the British consul, or chief British officer in any foreign port in which such ship shall arrive, for the inspection of such officer or officers, British consul, or chief British officer, in order to satisfy him or them that she has been properly registered, under the penalty of 100*l.* (*l*)

Certificates to be numbered, and an account of them transmitted to the commissioners of the customs.

31. The proper officer at every port where registers and certificates shall be granted, is moreover required progressively to number the same, beginning with progressive numeration, at the commencement of each year, and to enter an exact copy of such certificates with the number thereof, in a book, and also within one month to transmit to the commissioners of the customs a true copy, together with the number of every certificate which shall be so granted; and if any such officer shall neglect or refuse so to do, he is, for the first offence to forfeit one hundred pounds, and for the second offence two hundred pounds, and be dismissed from his office; (*m*) and the copies of certificates granted in Scotland are to be annually transmitted to the custom-house in England. (*n*)

26 Geo. III. c. 60. s. 37, 38.

The act then proceeds to a scale of charges to be paid upon the first registry of ships, in lieu of the stamp duties, and empowers the privy council to order ships to be registered, to whom certificates of registry have been promised in consideration of their services, though not entitled thereto by law; and suits commenced in the colonies touching certain requisites granted to ships under particular circumstances, are staid till His Majesty's pleasure be known. But these sections, as they apply to particular and local circumstances, have long ceased to interest.

Sect. 40, 41.

The act then inflicts certain penalties on officers neglecting their duty; and persons making false oaths, in any

(*l*) 26 Geo. III. c. 60. s. 34. (*m*) Sect. 35. (*n*) Sect. 36.

of the matters of the act requiring to be verified by oath, are declared guilty of corrupt perjury; and a penalty of 500*l.* is enacted against persons counterfeiting, erasing, altering, or falsifying any certificate required or directed to be obtained by this act. The penalties and forfeitures under the act are to be recovered in any of His Majesty's Courts of Justice; and it is further declared, that any officer concerned in seizures or prosecutions under this act, shall receive the same share of the produce arising from such seizures, or in the case of seizure for unlawful importation, shall be entitled to such share of any pecuniary penalty for any offence against this act, as any officer is by any law or regulation entitled to, under prosecutions for pecuniary penalties. Sect. 42.

Acts relative to trade.

32. In order, however, that the provisions of this important act might not be construed to infringe upon the general laws of shipping and navigation, it is specially provided by the forty-third section, that every matter contained in any act passed touching the trade, shipping, and navigation of Great Britain, and the colonies, plantations, islands, and territories thereunto belonging, which was not thereby expressly altered or repealed, should continue in full force, and that so far as the same related to the registry of ships and vessels, should be deemed to extend to all ships authorized and required by the above act to be registered, and to have certificates of registry. 26 Geo. III. c. 60.

Irish ships.

33. Ships registered in Ireland are subject to the same regulations as British ships, and are to be deemed entitled to the same privileges in all cases whatever. (*n*)

What ships to be deemed alien ships.

A subsequent statute then enacts, that all ships and vessels which by the 26 Geo. III. c. 60. are declared not to be entitled to any of the privileges or advantages of a British

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(*n*) 26 Geo. III. c. 60. s. 44. 27 Geo. III. c. 19. s. 1, 2. 39 & 40 Geo III. c. 67. art. 6. and 42 Geo. III. c. 61.

built ship, or of a ship owned by British subjects, and all ships and vessels not registered according to the directions of the above act are to be deemed alien ships, although such ships should be owned by His Majesty's subjects, and are made liable to the same penalties and forfeitures as alien ships. (*p*)

As it often happened that masters, owing to disputes with their owners, or from other causes, detained the certificate of registry, whereby a ship was prevented from pursuing her voyage, and exposed to other great inconveniences, the Legislature, with a view to this evil, provided a summary remedy by the next act of Parliament in order.

Masters maliciously detaining certificates of registry subject to penalties.

34. On complaint, made on oath, by the owner of any ship, whose certificate of registry is detained and refused to be delivered up by the master thereof, of such detainer or refusal, to any Justice of the Peace residing near to the place where such detainer and refusal shall be, either in Great Britain, Guernsey, Jersey, or Man, or in any colony, plantation, island, or territory to His Majesty belonging in America, such Justice, by warrant under his hand and seal, may cause the master to be brought before him to be examined touching such detainer and refusal. And if it appear that the certificate is not lost or mislaid, but wilfully detained by the master, such master is to forfeit, upon conviction, the sum of 100*l.*; and, upon failure of payment thereof, within the space of two days after such conviction, he may be committed to the common gaol, to remain without bail, for such time as the Justice shall deem proper, not being less than six months, nor more than twelve months. (*q*) And if the certificate be not found, the Justice is required to certify the detainer, refusal, and conviction, to the person who granted the certificate of register for such ship, who is required to register it *de novo*, notifying on the back of the certi-

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(*p*) 27 Geo. III. c. 19. sect. 13.

(*q*) 28 Geo. III. c. 34. sect. 13.

ficate the grounds on which such ship was registered *de novo.*(r)

Further provisions against masters of ships detaining certificates of registry.

35. But the good purposes of this act not being effectually secured by the above clauses, further provisions were introduced in a subsequent statute, (s) which enacts, that in case the master of any ship, who shall have received the certificate of the registry thereof, (whether such master shall be part owner or not) shall wilfully detain and refuse to deliver up the same to the proper officers empowered to make registry and to grant a certificate thereof, on the owner or owners, or the major part of the owners, of such ship, if such master has not any property therein; or on the other owner or owners, or the major part thereof of such ship, if the master has any share or property therein, requiring him so to do, it may and shall be lawful for the owner or owners, or the major part of the owners of such ship, (the certificate of registry of which shall be detained and refused to be delivered up) to make complaint on oath against the master of the ship who shall so detain and refuse to deliver up the same, of such detainer and refusal, to any Justice of the Peace residing near to the place, in Great Britain, &c. or in any of the colonies, plantations, or territories to His Majesty belonging; and on complaint, the said Justice or other magistrate shall, and is required by warrant under his hand and seal, to cause such master to be brought before him to be examined touching such detainer and refusal; and if it shall appear to the said Justice, &c. upon examination of the master or otherwise, that the said certificate of registry is not lost or mislaid, but is wilfully detained by the said master, such master shall be thereof convicted, and shall forfeit and pay the sum of 100*l.*, and on failure of payment thereof be committed to the common gaol, to remain without bail for such time as the said Justice shall deem proper, not being less than *six* months, nor more than *twelve* months.

(r) *Idem.* sect. 14.

(s) 34 Geo. III. c. 68. sect. 15.

The difference between the provisions in the two statutes does not appear, at first sight, obvious; but the following points of discrepancy will be found upon a comparison.

The 28 Geo. III. speaks of a detainer and refusal generally; the subsequent act is confined to a detainer and refusal to deliver up to the proper officers empowered to make registry. In the first, the terms wilful and malicious detainer are employed; in the last act, the word *malicious* is omitted. The first makes no provision for the case of a master being also part owner; but the last is in terms pointed to this case. The first applies to a request by any of the owners; the last is restricted to a request by the owner or owners, or at least a majority of the part owners, if the master himself be not one; or by the other owner or owners, or the majority of the other owners, if the master *be* one. The 28th empowers the magistrate to grant a search warrant; the last act does not. No case, it is apprehended, can come within this act, unless the demand upon the master be to deliver the certificate to the proper officer; a demand to deliver it, in order that an indorsement may be made upon it at the custom-house, will not bring the master who refuses to comply within the penalty of this last act.(*t*) But the act, in the same terms almost as the preceding act, directs the Justice or magistrate to certify the detainer, refusal, and conviction to the person who granted such certificate of registry, who is directed, upon the regulations of the law being complied with, to make registry of such ship *de novo*, notifying on the back of the new certificate the ground upon which the ship was so registered.(*u*)

No ship to be deemed qualified to trade until master shall have made oath to particulars herein mentioned.

36. No ship required to be registered, and carrying any goods to or from the British plantations in America, or to or from one plantation to another, shall be permitted to

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(*t*) See Abbott on Shipping, pag. 41., where the acts are compared; and Rex *v.* Pixley, 13 East. 91.

(*u*) 34 Geo. III. c. 68. sect. 19. 42 Geo. III. c. 61. sect. 21.

trade, or be deemed qualified for that purpose, until the master shall upon oath (or in case of a Quaker, upon his solemn affirmation,) before the governor or collector of the customs of the plantation where he shall arrive, give a true account of the name and burthen thereof, and other particulars, according to a form prescribed.(*w*) And in case any ship shall unload any goods in any of His Majesty's plantations in America, before such proof shall be made, such ship shall be forfeited, and prosecuted in like manner as if she had not been registered.(*x*)

The master to make entry of the ship with the principal officers, before proceeding to the place of unloading.

37. The master of every ship arriving in any British colony or plantation in America, shall, before he proceeds to the place of unloading, come directly to the custom-house for the port or district where he arrives, and make a just and true entry, upon oath, before the collector and comptroller, or other principal officer of the customs there, of the burthen, contents, and lading of such ship, with the particular marks, numbers, qualities, and contents of every parcel of goods therein laden, to the best of his knowledge; also where and in what port she took in her lading, of what country built, how manned, who was master during the voyage, and who are owners thereof, and whether any and what goods, during the course of such voyage, had or had not been discharged out of such ship, and where; and the master of every ship going out from any British colony or plantation in America, before he shall lade any goods to be exported, shall, in like manner, enter and report outwards such ship

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(*w*) A. B. maketh oath (or if a Quaker, solemnly affirms) that the ship called the ———, whereof he, this deponent or affirmant, is master, or hath the charge or command during the present voyage, being of the burthen of —— tons, came last from ———, and that she is, as he verily believes, the same ship described, meant, and intended, in and by the certificate now produced by him, and that the same does now, as he believes, belong wholly to His Majesty's subjects, and that no foreigner has, directly or indirectly, any share, property, or interest therein, to his knowledge or belief; 15 and 16 Geo. III. c. 31. sect. 1.

(*x*) 15 and 16 Geo. III c. 31. s. 1.

with her name and burthen, of what country built, and how manned, with the names of the master and owners thereof, and to what place he intends to pass or sail; and before he shall depart with such ship, he shall also deliver unto the collector and comptroller, or other principal officer of the customs at the port or place where he shall lade, a content, in writing, under his hand, of the name of every person who shall have laden any goods, together with the marks and numbers; and either coming into, or going out of, any British colony or plantation, whether laden, or in ballast, the master shall publicly, in the open custom-house, to the best of his knowledge, answer, upon oath, to such questions as shall be demanded of him by the collector and comptroller, or other principal officer of the customs, concerning such ship and the destination of her voyage, or concerning any goods laden on board, upon forfeiture of a hundred pounds, sterling money of Great Britain, for every neglect; to be prosecuted, recovered, and divided, in the same manner, and by the same rules and regulations, as other pecuniary penalties for offences against the laws of the customs or trade of His Majesty's colonies in America.(*y*)

And before departure to deliver a content.

And whether coming in or going out, to answer questions upon oath.

38. No goods shall be imported into, or exported out of, any colony or plantation in America belonging to, or in the possession of, His Majesty, or shall be laden in, or carried from, any one port or place in the said colonies or plantations to any other port or place in the same, or to Great Britain or Ireland, in any ship but what is of the built of Great Britain, Ireland, the islands of Guernsey, Jersey, the Isle of Man, or some of the colonies, plantations, or territories, in Asia, Africa, or America, belonging to, or in the possession of, His Majesty, except ships taken by any of His Majesty's ships of war, or by any privateer or other ship, and condemned as lawful prize in any Court of Vice-Admiralty, and also except ships condemned as forfeited in any court of record or

None but ships British-built, or condemned as prize, or under the Slave Trade Acts, are to import or export goods into or from the British colonies.

(*y*) 7 Geo. III. c. 46. sect. 9.

in any Court of Admiralty or Vice-Admiralty, for any offences relating to the slave trade; such ships respectively being owned by British subjects, navigated and registered according to law, on forfeiture of all goods otherwise imported, as also the ships; and the commanders of ships of war are to seize as prize all ships offending, and to deliver them to the Court of Admiralty. (z)

Ships condemned for offences against the Slave Trade Acts, may be registered as British ships.

39. All ships, whether British or foreign, adjudged to be forfeited under any act for the prevention, abolition, or regulation of the slave trade, in any court of record in Great Britain, or which shall be condemned in any Court of Admiralty or Vice-Admiralty in any part of His Majesty's dominions, for any offence in relation to the slave trade, shall be entitled to a certificate of registry as British ships, and thereupon enjoy all the privileges and advantages of British-built ships, in like manner with ships taken and condemned as lawful prize of war; but such ships shall be subject to the same duties and regulations, and shall be registered in the same manner, and subject to the same conditions and restrictions, penalties and forfeitures, and shall be owned and navigated, as ships condemned as lawful prize are required to be, in order to their obtaining British registers, and enjoying the privileges of British ships, according to law. (*a*)

Administration of the registry acts in the courts of law and equity.

Having thus detailed the principal provisions of the registry acts, we believe it cannot escape the observation of the reader, that they abound in many particulars, at once complicate and minute, and difficult to reduce to practice as the necessities of commerce may require. Nevertheless, with all their formalities, they have been found admirably adapted to effect the purpose for which they were intended, and the difficulties which arise in the detail of the system disappear, when the advantages resulting from their policy are brought before our view. They have sometimes, indeed, introduced much perplexity in questions of title to shipping, and have been employed to supersede equity by the formalities of the law ; but in a course of practice, and as they have been fully investigated and understood, the rigorous construction of them which once prevailed in our courts of justice has been softened down, and yielded to more equitable and practical considerations. They are properly maintained, in their substance, as the basis of the navigation of the country ; but they have been construed latterly in our courts of justice, not with literal strictness, but as a system of laws founded on great purposes of public policy ; open to considerations of natural equity, and yielding in their letter to cases of unavoidable accident and invincible necessity. The courts, therefore, have not excluded that construction which the urgency of a case will often require, and have administered them with the exercise of fair discretion under difficulties and doubts. In all questions, therefore, upon these laws, it will be found in the cases which we are about to consider, that the courts have never lost sight of their original purpose, and have never given them a larger authority than what belongs to them with reference to their leading object. The law requires a compliance with the general provisions of these statutes in order to constitute a perfect title to shipping; and it annuls (in the nature of a condition subsequent, defeating a previous title upon the omission of certain acts,) all contracts for an interest in ships in which any of the substantial requisites are wanting. In this respect, indeed, as in most others, the registry acts bear a strong analogy to the stamp acts. The strict observance of the stamp acts is enforced for the purposes of revenue. The strict observance of all the forms of registration, as respects shipping, is required for the great maritime interests of the country. But, in both cases, these formalities are merely modes of title: they in no respect alter the nature of a contract.

(z) 12 Car. II. c. 18. sect. 1. 7 & 8 Will. III. c. 22. sect. 2. 26 Geo. III. c. 60. sect. 10. 27 Geo. III. c. 19. sect. 13. 39 & 40 Geo. III. c. 67. art. 6. 54 Geo. III. c. 59. sect. 1.

(*a*) 54 Geo. III. c. 59. sect. 1. Before this act, a ship condemned for being engaged in the slave-trade, was deemed not to be entitled to a British register as a *prize* ship legally condemned: Rex *v.* Collector of Customs in London, 1 Maule & Selwyn, 262.

Public and private interests united in this system of laws.

Before we enter upon the review of the cases it must be allowed us to observe, that although these acts were chiefly framed upon political views, they have been found, in their execution, most admirably to combine the public interests of the state with the private advantages of the merchant; and, therein, to indemnify the latter for the numerous and complicate forms which they prescribe. They not only secure to the British mechanic the building and equipping of all the vessels which are employed in the coasting trade, colonial, foreign, domestic commerce, and the fisheries of the country, but they acccomplish many other beneficial purposes. They prevent frauds upon underwriters; they give confidence and security to contracts, by making the property of ships always a legal and never an equitable interest; they enable a purchaser, the assignees of bankrupts, and other representatives of an owner, to trace a ship from port to port in all the various transfers through which she may pass. Besides this, as is well observed by Mr. Reeves, (*b*) a very considerable utility arises from the documents which are formed in the execution of the registry acts. The registry of shipping, which is made up to the 30th of September, in every year, contains facts of importance, which become premises for conclusions both of a political and commercial nature. In this register is seen how many ships and vessels belong to every distinct port, their tonnage and size, and the number of men employed in navigating them. It is now accurately known where to look for the most abundant supply of seamen when the public service demands them. It is further known at what ports to enquire for ships of a

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(*b*) Reeves, 488.

particular tonnage—whether they are wanted by the government for transports, or by the merchant for freight. Such facts should be known; but they were never brought forward, and made the subject of familiar knowledge, till the general register of shipping was required under Lord Liverpool's acts.

Cases and decisions.

A registry is not a document required by the law of nations as expressive of a ship's national character.(*c*) Indeed the registry acts are altogether to be considered as forms of municipal institution, and scarcely any traces of a like system are to be found in the laws of any other nation. So, likewise, a foreign built ship, British owned, is not required to be registered.(*d*) The policy of the navigation law and of the registry acts generally, is to confine our commerce as much as possible to British-built ships, and with this purpose to confer certain privileges upon such ships to which foreign vessels are not entitled; and in some trades, as in the colonial and coasting trade, to inflict a forfeiture on any foreign vessel engaging therein. But it was not the policy of the Legislature to prevent British subjects altogether from employing foreign ships in neutral trade in as ample a manner as they can be employed by aliens. The disability, therefore, of foreign ships is this, that they cannot be employed in certain trades; that they cannot procure a registry, and, therefore, cannot become entitled to the privilege of British-built ships; but, though they cannot be registered, British subjects, in some particular cases, are not prohibited from owning and navigating them, or employing them on certain occasions. There is a sufficient security, however, for their not being extensively employed, as they are liable to the alien duties, and other disadvantages from which British-built shipping is

Of foreign ships British owned; their privileges and disabilities.

(*c*) Le Cheminant *v.* Pearson, 4 Taunt. 367.

(*d*) Long *v.* Duff, 2 Bos. & Pull. 209.

exempted. The registry acts indeed, by taking from these vessels the privileges of British shipping, have pretty nearly put an end to foreign ships, British owned, being employed in any trade whatever.

Doubts had formerly existed on the 26 Geo. III. c. 60. as to the precise distinction between the privileges of British-built ships, and foreign ships British owned; that doubt was removed by the 27 Geo. III. c. 19. which declares that all ships not entitled by the 26 Geo. III. to the privileges of British-built or British-owned vessels, and all ships not registered according to the said act, shall, although owned by British subjects, be deemed alien ships, and be liable to the same penalties and forfeitures as alien ships. The result, therefore, seems to be this, that foreign ships are under great disabilities, but they are not an interdicted property. British subjects may be owners of them, and may navigate them, except in certain branches of commerce; but they are not entitled to any of the privileges of British-built ships, and cannot be registered.

To be deemed alien ships, and subject to duties, penalties, &c.; but not a prohibited property to British subjects.

It should seem, moreover, by analogy to a recent decision, and upon principles of public policy, that a foreign-built ship, owned in part or in whole by British subjects, would be under disabilities not attaching to such ship if British subjects had no share or interest in her. For example: by the commercial treaty with the United States of America, vessels built in the countries belonging to them are permitted to import goods of the growth and manufacture of the United States into Great Britain; but such vessels must be *owned* by the subjects of the United States. In the same manner, the 51 Geo. III. c. 47. allows to Portuguese ships, owned by the subjects of the Portuguese government, the privilege of importing goods of the growth and manufacture of the dominions of the Crown of Portugal into Great Britain. These privileges, thus conceded to these States, are a dispensation of the rule in the third section of the navigation act. Now, it would

Of foreign ships, British owned.

seem at first view reasonable that British subjects might participate in a trade which the law allows to foreigners; but the law is otherwise, and the principle appears to be a sound and wise one. It is quite manifest that an American or Portuguese ship would lose her privilege of importing goods into this country, if she were owned in *whole* or *part* by British subjects; the privilege being conceded only to ships of the built of the particular country, importing goods of the growth or manufacture of that country, and *owned by its subjects.* There is, indeed, no express determination upon this point: but it would appear from the following case that the rule of law is as extensive as we have stated it.

A privilege given by act of parliament to ships belonging to any state in amity with His Majesty, &c. does not extend to foreign-built ships British owned.

An information was filed by the Attorney General for the condemnation of a ship and her cargo, on the ground of an illicit importation of flax-seed, &c., from Russia. It appeared that she had been American property; had been purchased by a British subject in 1809, and from that period had made several voyages to this country; some voyages in the character of an American, and others under different flags; but she had not received, nor was she entitled to receive, (being foreign-built) the character of a British ship by being registered as such. The report of her at the custom-house on the occasion of the present importation, was; 'In the ship Jane,—no register—foreign-built—property all British—from Archangel—cargo, flax-seed, &c.' The point raised was, whether the vessel was protected under the 43 Geo. III. c. 153. s. 4., which made it lawful, during the continuance of hostilities, for any person to import into the United Kingdom any sort of flax, or flax-seed, in any ship belonging to any kingdom or state in amity with His Majesty, navigated by foreign seamen, from any port or place whatsoever, upon the same terms and conditions, &c. as if the same had been imported in foreign ships of the built of the country or place of which such flax or flax-seed was the growth, &c., notwithstanding the prohibition in the navigation act. The Lord

Attorney Gen. *v.* Wilson.

Chief Baron, (THOMPSON) who tried the cause, reserved the point of law, whether a British subject could own such a ship, and employ her in such an importation, by virtue of the clause in the act above cited. Upon the part of the defendant it was contended, that although the vessel in question was confessedly a foreign ship, and not entitled, as such, to a British register, yet, inasmuch as she was the property of a British subject, a merchant residing in England, she was to be considered (if not within the letter, within the policy, of the statute) as belonging to a state in amity with His Majesty: and the case of Pearce *v.* Cowie (*e*) was cited, in which GIBBS, L. C. J. was reported to have ruled that a foreign-built ship, the property of a British subject, belonging to a state in amity with His Majesty, was within the meaning of the 43 Geo. III. c. 163. s. 13; the defendant's counsel added that this decision had been followed up by a similar one of Lord ELLENBOROUGH in a subsequent case on the same policy, (*f*) who was reported to have said on the point being raised, "It will be difficult to make me believe that a British subject is not a subject of a state in amity with His Majesty." They further pressed the improbability of its being the intention of the Legislature to afford a commercial advantage to a neutral state which it denied to its own subjects. They submitted, therefore, that in a case on the construction of a beneficial statute, passed in relaxation of a more rigorous law, for the purpose of granting privileges of commercial advantage to neutral ships; not for the benefit of the neutral, but of the British nation; the Court must, in a case of doubt, decide in favour of the British trade,—That an alien ship, belonging to a British owner, was entitled to all the privileges conferred upon subjects of states in amity with His Majesty.

On the other hand, the Counsel for the Crown objected to the case of Pearce *v.* Cowie, as a hasty *dictum* thrown

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(*e*) 4 Camp, N. P. 364.

(*f*) Pearce *v.* Glover.

Attorney Gen. *v.* Wilson.

out at *Nisi Prius*, without having undergone discussion, as it afterwards went off on another ground. (*g*) To shew that the Legislature had on many occasions observed a material distinction between the state itself and any other state in amity with it, (independently of the obvious and natural difference of the terms) they adverted to the various sections of the navigation act, and of the present statute, wherein that distinction was recognized, particularly in the fifth section of the latter, which gives a privilege to import in ships built in, or belonging to Great Britain, OR belonging to any state, &c. in amity with His Majesty. They contended, that a state in amity with His Majesty could not, by any construction, be made to mean any part of His Majesty's dominions; nor could a subject of His Majesty be the subject of a state in amity with His Majesty. The main object of a distinction taken between a British registered ship, and a ship foreign built, *British-owned*, is to encourage the former to the disadvantage of the latter, according to just notions of policy. The Lord Chief Baron, in giving judgment, observed, that the terms 'ship or vessel, belonging to a kingdom or state in amity with His Majesty,' in their plain acceptation, necessarily referred to some kingdom or state whilst in a friendly relation to this country, and such a state as might hereafter become hostile to this kingdom, and not to the ships of individuals who compose part of the body of the subjects of this kingdom. Upon the whole, the Court was of opinion, that a privilege given by act of Parliament to ships belonging to any state in amity with His Majesty, and manned with foreigners, to import merchandize otherwise prohibited, did not extend to foreign-built ships belonging to British subjects; the privilege being one *strictissimi juris*. (*h*)

Indeed, it is the obvious policy of the navigation laws,

(g) Holt's Nisi Prius Cases, p. 69.

(*h*) Attorney General *v.* Wilson, 3 Price's Ex. Rep. 431.

Of foreign ships, British owned.

and more especially of our registry acts, to encourage British ship-building, and British ownership, as the two chief instruments of maintaining and advancing our maritime interests. Having this object always in view, the Legislature, as far as it is possible, discourages and prevents the employment of British capital in all foreign shipping, and almost effectually compels our merchants to carry on both the export and import trade in ships of British built. The statute of 7 & 8 Will. excluded foreign built ships altogether from the plantation trade, and the 26 Geo. III. c. 60,, as we have before observed, almost put an end to foreign ships, British-owned, by taking from them the privileges of a British ship; so that the trade of Great Britain after that act, with very few exceptions, was to be carried on in British-built ships equally with the plantation trade. The 34 Geo. III. c. 68., completed what the previous statutes had begun. Hitherto the navigation system had confined all its restrictions upon shipping, whether British or foreign, to the importing of goods only, except in the plantation trade; but this latter statute enacts that no ship, registered or required to be registered as a British ship, shall be permitted to export any articles whatsoever, unless manned with and navigated by a master, with three-fourths at least of the mariners British subjects. By this act, the exportation to foreign places in Asia, Africa, and America, must be made by the same sort of shipping and navigation as the importation hitherto had been. (*i*) And, as respects the European trade, the registry acts have imposed the like restrictions. All articles of European trade, previous to these acts, such at least as were not included in the eighth section of the 12 Car. II., might be imported in any ships, British or foreign, howsoever manned and navigated; but the 34 Geo. III. c. 68., by enacting that no ship registered, or required to be registered as a British ship, shall import or export any articles whatsoever, unless navigated by a

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(*i*) See *ante*, page 134.

Of foreign ships, British owned.

master, and three-fourths at least, of the mariners, British subjects, has put all imports in British ships under the same restrictions with those included in the eighth section of the navigation act, and has created a restriction as to exports which before was unknown, except in the plantation trade, where the whole trade, export as well as import, was confined to British-built ships, manned and navigated in this manner. (*j*)

Sewell *v.* The Royal Exchange Company.

During the war, and the extensive system of licences to which it gave rise, foreign ships, under the protection of acts of Parliament, were frequently employed as British ships; and a question once arose, on a policy of insurance, to what extent British subjects might employ such vessels. The Court of Common Pleas determined, that a British subject, purchasing by the King's licence a hostile-built vessel, not entitled or required to be registered, chartering her on a voyage out to the Azores and home, and sending her to sea with a crew in which there was not the proper proportion of British mariners required by the navigation act, did not thereby avoid a policy on the outward voyage, because he might obtain the proper number of British seamen before her return:—And that it was no objection to the policy that the ship was foreign-built, for that the statute 49 Geo. III. c. 60., authorized the ships of any country in amity, by the King's licence, to bring foreign produce to England, though the ship was not English-built or registered, contrary to the navigation act; and that a ship, purchased by a British subject from an enemy, by the King's licence, was to be deemed a ship of a country in amity. (*k*)

This case, however, is obviously different from the case

(*j*) See *ante*, page 162; and Reeves, 341.; see likewise the Free Port Acts, and the trade permitted to the colonies in America, under the dominion of foreign European states, p. 50, 51., *ante*.

(*k*) Sewell *v.* Royal Exchange Company, 4 Taunt. 856. and the Reporter's note.

Of foreign ships, British owned.

of the Attorney General *v.* Wilson, before cited. The object of the act of Parliament on which it turned was to elude the continental system, and to empower His Majesty to license ships to trade directly contrary to the navigation act. The statute enacts, that during hostilities it may be lawful, by order of council, to import into the United Kingdom, from any port of Europe or Africa in *British or friendly* ships, *however navigated,* any goods or commodities which might be lawfully imported, being the growth or produce of any country, upon the payment of the same duties, and subject to the same restrictions, as if imported directly from the place of the growth or produce of such goods or commodities in the same ships or vessels *respectively.* It is clear, therefore, that a British subject might import such commodities in a foreign-built ship, however navigated; for the act speaks *indifferently* of importations made by British or friendly ships, and gives permission to its subjects to import in *either.* But the clause of the 43 Geo. III. c. 153. s. 4., only gives permission to import the goods therein mentioned in vessels *belonging* to states in amity with His Majesty; a privilege, *stricti juris,* which did not extend to such ships, British owned.

Of foreign-built ships, British owned, in the East India trade.

So foreign-built ships, British owned, may still be employed by the East India Company, during the continuance of their charter; such ships, however, must be built within some of the territories of the Company, or in parts under the immediate protection of the British flag in the East Indies. These vessels must likewise be registered according to the forms prescribed by the 55 Geo. III. c. 116., and are not suffered to trade beyond the limits of the Company's charter. (*l*)

When the statutes speak of the *built* of a vessel, they

(*l*) 35 Geo. III. c. 115., 42 Geo. III. c. 20. See likewise page 95, and 141, *ante*, as to the employment of Asiatic sailors and lascars.

What is meant by a vessel being of the built of a foreign country.

are to be understood as using the term in its plain and natural sense. It was therefore determined by Lord Ellenborough, that a ship was not to be deemed of the built of Russia, within the meaning of the navigation act, which, having been originally constructed in another country, was wrecked on the coast of Russia, and repaired there at an expense of more than two-thirds of her value; although by the law of Russia, she was, under these circumstances, treated as a Russian ship, had a Russian register, was owned by a Russian subject, and was navigated under the Russian flag. "Repair," says his Lordship, "is not built. A ship must be of the built of the place where she was originally constructed; and while her identity continues, it is impossible, in the nature of things, that the place of her built should ever be altered. The law of Russia cannot be of force to control the navigation act of Great Britain." (*m*)

Who may be the owner of a British ship.

No person, we have seen, (*n*) is entitled to be the owner, in whole or in part, of a British ship, required to be registered, who has not his usual residence in Great Britain, or in the dominions belonging to the Crown. It has, therefore, been holden upon this clause of the act of 26 Geo. III., that a person who is continually shifting his residence, so as not to have, under any extension, what can be deemed an usual residence *here*, does not come within this description of the statute. He must be, unless in the cases which are specified, usually resident in this country. (*o*)

Cases and decisions upon the transfer of property in ships, whether in whole or part, under the registry acts.

The most numerous, and perhaps the most embarrassed cases, are those which have arisen upon the provisions of the registry acts relating to the transfer of property in ships. We shall proceed to examine the leading cases, and to arrange them, as far as possible, into some classifica-

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(*m*) Redhead *v.* Cater, 4 Camp. 188.

(*n*) 26 Geo. III. c. 60, s. 8.

(*o*) 1 Edw. 148.

Cases and decisions upon the transfer of property in ships.

tion and order. The three great provisions of these acts are, first, that the party should have such a residence in the British dominions as would entitle him to a British register. He must not, as we have above said, be a person coming occasionally, and for the purpose of obtaining a colourable domicile: secondly, that the ship shall not only be built, but, unless under circumstances of great emergency, repaired in the British dominions; and, thirdly, that there should always be a clear *constat* of the real ownership; and therefore, if any transfer of the property take place, it must be declared, and the transfer indorsed on the register. But a bill of sale from the original builder to the first purchaser of a new ship need not contain a recital of the certificate of registry; nor can properly do so, because the ship does not require to be registered till she is out of the hands of the builder, though the owners must cause her to be registered before the commencement of a voyage. (*p*)

Through most of the forms of registry and transfer which are required by the statutes, there are two acting parties; the one, the parties in the registry, or contract; the other, the public officers. The equity of the Legislature does not hold the one responsible for the acts of the other. If the parties in the registry or contract have omitted any of the regular forms, the act is incomplete, and the contract is annulled as the penalty of their act of omission. But if the public officers have made such omission, the contract is not thereby vacated. The distinction is, that as respects the contracting parties, the statutes are imperative, but are directory only as respects the public officers. It has been holden, therefore, that the omission of the officer at the out-port to transmit a copy of the indorsement upon the certificate of registration to the custom-house in London does not invalidate a transfer. (*q*)

(*p*) Abbott, 54.

(*q*) Underwood *v.* Miller, 1 Taunt. 187.

Cases and decisions upon the transfer of property in ships.

The 34 Geo. III. c. 68. s. 15., which gives the form of an indorsement upon the alteration of property in a vessel, uses the expression "*all* my, or our, right, share and interest." It would seem, therefore, as if by some oversight, the framers of the act had neglected to provide for the case of a sale of a *part*. A question once arose upon this section; and it was contended that a transfer of any interest in a vessel would be defective, unless it stated that the interest transferred was the *whole* interest of the vendor. But the Court of Common Pleas decided, that upon the sale of any share, it was not necessary that the indorsement upon the certificate of registration should express the share to be *all* the vendor's interest; and that a person possessing a share in a vessel might sell, or divest himself of any part, and still remain master of the residue. (*r*) The provisions of these statutes are not confined to the transfer of property to a stranger, but apply also to a transfer by one part-owner to another. And where such a transfer was made whilst a ship was at sea, and the provisions were not complied with in the limited time after her return, the assignees of the party making it, who had become a bankrupt, were held entitled in a Court of equity to have an account of the voyage from the other part-owner. (*s*)

Rolleston *v.* Hibbert.

The first case decided on the 26 Geo. III., was Rolleston *v.* Hibbert, (*t*) in which it was determined, that an absolute bill of sale of a ship then at sea, was void by 26 Geo. III. c. 60. s. 17., unless the certificate of the registry were recited therein: therefore, although the vendee gave at the same time an undertaking to restore the ship on a future day on payment of a certain sum advanced by him on the credit of the security of the ship: and although the vendee had also the grand bill of sale, and had taken possession of the ship immediately on her

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(*r*) Underwood *v.* Miller, 1 Taunt. 387.

(*s*) Speldt *v.* Lechmere, 13 Vez. Jun. 588. and Abb. 55.

(*t*) 3 T. R. 406.

Cases and decisions upon the transfer of property in ships.

arrival, it was, notwithstanding, held that he could not retain the ship, as having a lien on her, against the assignees of the vendor who became a bankrupt after the transfer. Previous to this statute, the delivery of the grand bill of sale of a ship at sea had been repeatedly held to be equivalent to the delivery of the ship itself, without any other superadded forms. (*u*)

Rolleston *v.* Hibbert.

In the case of Rolleston *v.* Hibbert, Lord Kenyon said, that it was not necessary that the property in a ship should pass by a written instrument; but that if the parties chose to convey by a written instrument, they should not be permitted afterwards to refer to any other agreement. This opinion, so expressed, was the occasion of the clause in the 34 Geo. III. c. 68. s. 14., that no transfer of property in any vessel should be valid unless made agreeably to the 26 Geo. III. c. 60., and unless the transfer should be made by bill of sale, or instrument in writing.

Clerical mistakes will not vitiate a bill of sale.

But notwithstanding the seventeenth section of the 26 Geo. III. c. 60. enacts that a bill of sale of a ship shall be absolutely void, unless the certificate of the registry be truly and accurately inserted therein, it has been determined, upon manifest principles of equity, that a mere clerical mistake shall not vitiate the bill of sale. (*x*) But the indorsements on the certificate of registry are not required to be recited in the deed of assignment of a ship; for the Legislature looks principally to the public interests in these acts, and not, in the first instance, to the purchaser. Now, as the certificate of registry must be registered at the custom-house, with the indorsements thereon, the ship's owner cannot fail to be known; and as the purchaser must have the certificate of registry recited in the bill of sale, he will be directed thereby to resort to the custom-house for any information which he may want. As the public, therefore,

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(*u*) Atkinson *v.* Malling, 2 T. R. 462.

(*x*) Rolleston *v.* Smith, 4 T. R. 161.

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are sufficiently protected without any recital of the indorsements, it has been holden no good objection to a bill of sale of a ship that it did not recite them. It will, however, says a learned author, be always prudent, though it be not essentially necessary, to recite in a second, and every subsequent bill of sale, the indorsement made in pursuance of every previous transfer.(*y*) So, where the parties by mistake misrecited in a bill of sale the certificate of registry, by stating Guernsey as the port where the certificate was granted, instead of Weymouth, (which mistake was rectified when discovered, by consent of all parties, and the deed delivered *de novo*,) the Court of King's Bench held that no new stamp was necessary upon such re-execution; the deed taking no effect from its first delivery, and the defect arising not from intention but from mistake, and the alteration merely making the contract what it was originally intended to have been.(*z*) But where A. and B. were joint owners of a ship, and A. conveyed his moiety to B., but in the bill of sale the certificate of registry was not accurately and truly recited, the word *oath* being used instead of *affirmation; sworn*, instead of *affirmed;* the allegation that another part-owner was not resident within *twenty miles* being omitted, and the name of the *master* changed: under these circumstances, although B. took possession, and afterwards mortgaged the whole ship to A., (who did not take possession) and B. afterwards ordered C. to repair the ship, and then conveyed one half of the ship to A. and the other to D.; it was held that the first bill of sale was an absolute nullity, and that as the certificate of registry was not truly and accurately recited therein,(*a*) there was no legal transfer of the ship.

The bill of sale is a nullity when the certificate of registry is not accurately recited therein.

We have seen that the 34 Geo. III. c. 68. s. 16. requires

(*y*) Capadose *v.* Codnor, 1 B. & P. 483, and Abbott, 58.

(*z*) Cole *v.* Parkin, 12 East's Rep. 471.

(*a*) Westerdell *v.* Dale, 7 T. R. 306.

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that if a vessel be absent from the port to which she belongs when an alteration takes place in the property, the sale must be made as directed by the 26 Geo. III. c. 60.; and within *ten* days after such ship shall return to the port to which she belongs, an indorsement must be made and signed by the owner, or some person legally authorized, and a copy of such indorsements be delivered to the officer of the custom-house authorized to make registries and grant certificates, otherwise the bill of sale, or contract, or agreement for sale, is to be utterly null and void. The intent of this clause is to prevent an interest passing in ships from one British owner to another, until the public have that information which is so essential to its commercial welfare. The conditions of the act, therefore, must be strictly complied with, and where a bill of sale has been executed, and the requisites of the registry acts, under certain circumstances, are not completed until the rights of third persons intervene, no relation will hold good so as to make the conveyance effectual from any antecedent time. For it is obvious, that if the act were to be considered as giving an indefinite time for the compliance with its requisites, it would enable a transfer of property to be made to foreigners, who might remain concealed owners, and thereby defeat the material provisions of the acts. This was decided in Moss *v.* Charnock,(*b*) which, being a case that has excited much discussion, it will be necessary to state fully.

Case of Moss *v.* Charnock.

It was an action of trover brought by the plaintiffs, assignees of Kirkpatrick, a bankrupt, against the defendant, who claimed two third parts of a ship, as the vendee of Kirkpatrick, before his bankruptcy. The facts of the case were shortly these: Kirkpatrick being indebted to the defendant in more than the value of his share of the ship, in August, 1800, made a bill of sale to the defendant, and sent it to him; but the defendant declined accepting it till the 15th of November, 1800; and on the 19th

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(*b*) 2 East. 400.

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of that month Kirkpatrick became a bankrupt. On the 15th of December, and not *before*, the requisites of the 34 Geo. III. c. 68. s. 16., in respect to the transfer of ships not in port, were complied with; and within ten days after the return of the ship to port, an indorsement was regularly made on the certificate of the registry, and the other requisites of the act complied with. On the part of the plaintiffs it was contended, that the requisites of the 34 Geo. III. not having been satisfied before the bankruptcy, the sale was not complete at that time; in answer to which the defendant's counsel insisted, that as the requisites of the statute were complied with within a *reasonable* time after the execution of the bill of sale, that would by *relation* make the sale complete from the 15th of November, a period before the bankruptcy. The Court of King's Bench decided that the plaintiffs were entitled to recover, upon the ground that Kirkpatrick having become a bankrupt between the time of executing the bill of sale to the defendant, and the time of the defendant's complying with the requisites of the registry acts, the property did not pass to him, notwithstanding such requisites were completed after the act of bankruptcy. Upon this case it is suggested, in a very learned treatise, that Mr. Justice Lawrence, who delivered the judgment of the Court of King's Bench, must be understood to speak, (with reference to the facts of the case before the Court,) of such requisites only as *may*, according to the circumstances of the transaction, be immediately complied with; and did not mean to intimate, that if Charnock had delivered a copy of his bill of sale to the officers before the bankruptcy of Kirkpatrick, so as to have enabled them to make the proper indorsement on the affidavit, he would not thereby have acquired an *inchoate* title, which might have been perfected by the indorsement made on the certificate within ten days after the ship's return. (*c*)

Moss *v*. Charnock.

(*c*) Abbott 60.

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The case of Moss *v.* Charnock has, indeed, been questioned by some learned judges. In Mestaer *v.* Gillespie, (*d*) the Lord Chancellor observed, that the generality of the proposition stated by a very able judge, in Moss *v.* Charnock, excited a doubt in his mind, whether what was there laid down must not be qualified.—"The proposition (he says) as stated in that judgment, goes to this extent, that if a man sold a ship at sea, the vendee having done every thing required by the act which could be done; but afterwards, before the arrival of the ship in port, an act of bankruptcy was committed by the vendor, the assignee under a commission of bankruptcy, and not the vendee, would take the ship. The proposition is not so stated in terms, but the language in which the judgment is expressed covers that case. I cannot concur in that; and I apprehend the proposition that the grant of an annuity is good for nothing, if a bankruptcy takes place before enrolment, would have been a considerable surprize upon Lord Thurlow. But my observation does not apply to the actual decision in that case." Mr. Baron Wood, likewise, in another case expressly (*e*) dissented from the doctrine laid down in Moss *v.* Charnock; and, speaking of the provision in the 26 Geo. III. c. 66. sect. 16. said—"No time is here limited within which the copy of the indorsement shall be delivered; and, therefore, I take it the inference of law is, that it shall be done within a reasonable time; and until that time is elapsed, I hold the bill of sale remains good, and the property legally transferred to the vendee." And, again, "It has been contended, that no property passes from the vendor to the vendee till all these things have been done; and the case of Moss *v.* Charnock has been cited to prove that position; and it has been said, that if an act of bankruptcy intervenes before the delivery, although the delivery be within a reasonable time afterwards, the vendee loses the ship. With great deference to that authority, I cannot

Authority of Moss *v.* Charnock disputed.

(*d*) 11 Vesey, jun. 637; see this case, *post.*

(*e*) Hubbard *v.* Johnstone, 3 Taunt. 207.

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agree to it; I think that the property passes *instantly by the bill of sale*, and that the subsequent acts to be done are not necessary to transfer the property, but that the grant is defeasible by subsequent omissions, in cases where it is so expressly provided, but not otherwise."

Principle of the case of Moss *v.* Charnock limited in Palmer *v.* Moxon, 2 M. & S. 43.

So, in a subsequent case, Palmer *v.* Moxon,(*f*) Lord ELLENBOROUGH, in commenting on the case of Moss *v.* Charnock, says—" I think the case of Moss *v.* Charnock was rightly decided; though, perhaps, there may be some expressions found in it, (as has been observed by the Lord Chancellor,) which go farther than the case required, or the law warranted. I confess that I have always thought that the things required to be done by the act were in their nature conditions subsequent. What is required to be done within ten days must undoubtedly be *done* within ten days; but where no time is limited, the act must be done within a reasonable time."—LE BLANC, J. observed, that he concurred in the decision in Moss *v.* Charnock; but added, that he thought the observations of the Lord Chancellor, in Mestaer *v.* Gillespie, as well as what fell from the Court, in Hubbard *v.* Johnstone, had put a limit to some of the terms in which the judgment was conceived in that case. BAYLEY, J. said—" I think the case of Moss *v.* Charnock was rightly decided under the circumstances; for there the bill of sale was executed on the 23d of August, and the requisites of the statute were not complied with until the 5th of December, so that there was *gross delay*. Expressions used in that case have been pressed upon us; but those expressions appear, upon consideration, to have gone farther than what was necessary, or than the law warrants. The true construction of these acts seems to be this, that the bill of sale shall be holden to transfer the property from the time of its execution, but shall be liable to become void, *ex post facto*; that is, if the party does not

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(*f*) 2 M. & S. 43.

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comply with the requisitions of the statute within a reasonable time; upon the failure of which, the statute makes the sale null and void. DAMPIER, J. said, that the case of Moss *v.* Charnock was, in his judgment, properly decided; because the requisites of the statute, considering them as conditions subsequent, were not complied with within a *reasonable time.* When, therefore, those expressions again fell under the consideration of the Court, the judges thought they ought to be restricted. "It seems to me (he added) that these are conditions subsequent (the conditions prescribed by the statute,) there are no words in the act to shew that they ought to be taken as conditions precedent. The efficient act is the bill of sale, which is to be void, if the requisites of the statute are not complied with afterwards. That falls precisely within the definition of a condition subsequent. It must be left to a court and jury to say, whether there has been a compliance within a reasonable time, and in what manner the condition has been performed."

Palmer *v.* Moxon.

The case of Palmer *v.* Moxon, from which the above judgments are cited, has been introduced somewhat out of its place; but as Moss *v.* Charnock was so fully considered by the Court in their judgment, we have taken it out of its order on that account.

The case of Palmer *v.* Moxon was as follows:—The plaintiffs had recovered a judgment against one Moody for 237*l.* and a writ was delivered to the defendant, Sheriff of the town and county of Kingston-upon-Hull, (indorsed to levy the above sum) on the 11th of June, 1812, at a quarter past twelve o'clock in the afternoon. The Sheriff's officer, about half-past three o'clock in the same afternoon, took possession of one-fourth part of the brig Thirsk, then lying in the port of Hull, being the port to which she belonged, and in which she was registered. It appeared that on the 10th of June, the day previous to the levy, Moody, being owner of one-fourth, Duckles of

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Palmer *v.* Moxon.

another fourth, and Matthias Moody and Thomas Duckles of another fourth part, by a bill of sale of that day, in consideration of the sum of 910*l.* paid to them in their respective proportions, sold to A., B., and C., &c., three full, equal, and undivided fourth parts of the said brig. A copy of the certificate of the registry was set forth in the bill of sale, which was executed on the day of its date by J. and M. Moody and T. Duckles, about five o'clock in the afternoon; and at the same time a memorandum of the transfer by all the *four* was indorsed on the certificate of the registry, and was signed by the *three;* but neither the bill of sale nor the memorandum of transfer was signed or executed by R. Duckles, until the 15th of June following. On the 11th of June, at a quarter before two in the afternoon, a true copy of the memorandum so indorsed on the certificate of registry, and signed by the three as aforesaid, was left with the proper officer of the custom-house, at Hull, to be entered; and on the 15th of June, another copy of the memorandum, with the signatures of the four, was also left with the proper officer for the same purpose. The Sheriff's officer, as above stated, made his levy at half-past three in the afternoon of the 11th of June; but the Sheriff, on being ruled, returned *nulla bona*, and an action being brought against him for a false return, the Court of King's Bench were of opinion that he acted properly in abandoning the brig; and that the requisites of the registry of the act were complied with within a reasonable time. Lord ELLENBOROUGH in this case observed—" That a reasonable time was capable of being ascertained by evidence; and, when ascertained, is as fixed and certain as if fixed by act of parliament. In this case, all that was required to be done by the parties to the transfer was done by three of the four, one of them being the person whose share was in question; and what was done by them was done, as near as may be, *instanter;* a copy of the indorsement was left with the officer the next day after executing the bill of sale and signing the indorsement; but it appears that one of the parties did not execute until afterwards, but still, when he executed, he did it within a reasonable time, and all was perfected before the return of the writ." (*g*)

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Though the judges, in delivering their opinion in Palmer *v.* Moxon, have anxiously guarded the case of Moss *v.* Charnock from being considered as overruled, it must be confessed that the principle on which that case was decided can no longer be deemed tenable to the extent in which some of the propositions are laid down. Moss *v.* Charnock, therefore, must be considered as standing upon its peculiar circumstances; it must be viewed as a case of gross negligence on the part of the defendant, the vendee of the ship, who not only did not comply with the requisites of the registry act within a reasonable time, but suffered several months to elapse after the execution of the bill of sale without satisfying *any one* of the forms of the statutes; and did not comply with them, in point of fact, till sixteen days after the bankruptcy of the vendor. There was likewise this additional circumstance in that case expressly dwelt upon by Mr. Justice Lawrence; that, at the time when the vendor executed the bill of sale of his share in the ship to the defendant, he did not deliver up possession of the *original bill of sale of the same shares to himself;* but that it continued in his custody till after the bankruptcy, when it was found in his chest by the assignees under the commission. In looking at the case, it will be observed that the plaintiff relied on the 21st of Jac. I. as well as on the non-observance of the registry acts; and LAWRENCE, J. addressing himself to this part of the case, says—" That if we look at the prevention of fraud, the necessity of the quickest compliance with the requisites of the statute 34 Geo. III. c. 68. is obvious; for if they were delayed, and the grand bill of sale, or other document, should remain with the vendor (as it did many months in this case,) a door would be open to the greatest fraud, from the reliance men would place on the

Examination of the case of Moss *v.* Charnock.

(*g*) 2 Maule & Selwyn, 50.

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possession of such bill of sale, when no evidence of any transfer from the possessor could be found on searching the registry." (*h*) Upon the whole, therefore, the case of Moss *v.* Charnock, rightly limited, is not at variance with Palmer *v.* Moxon; at the same time, as regards the obligation to comply with the requisites of the registry act, the rule seems to be that which has been laid down by Mr. Baron Wood, in Hubbard *v.* Johnstone, with some slight addition from the late judgment in Palmer *v.* Moxon; namely, that the forms of the registry acts, which the law requires to constitute a perfect title to a ship, are in their nature conditions subsequent; that the property of a ship vests in the purchaser from the time of the execution of the bill of sale, not from the time of compliance with the registry act; but that the transfer is liable to become void, *ex post facto*, if the forms of the registry acts, as prescribed by law, are not observed within a reasonable time, or, where a fixed time is expressly limited, (for example, ten days) *within* that time. In other words, that the efficient act is the bill of sale; but that the statutes make the sale absolutely null and void, unless the requisites are complied with within such a time as the act *expressly* requires, where it makes time a constituent of title; or within such period as the court and jury may deem reasonable under the circumstances of the case, where the time is left indefinite.

Forms of the registry acts are in the nature of a condition subsequent.

It is quite clear, indeed, that the bill of sale must be the first act; and the very form of indorsement which the statute prescribes upon an alteration in the property of the vessel *(Be it remembered that I have this day sold and transferred)* assumes that a transfer has already taken place by the bill of sale; and it further enacts, (that a copy of the indorsement shall be delivered, &c., otherwise such *sale* shall be void.) It, therefore, falls precisely within the meaning of a condition subsequent, which is defined to be, such a condition as defeats an estate by

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(*h*) 2 East. 403.

some subsequent act.(*i*) It is quite clear that the subsequent acts cannot be done *instanter*, for they are in their nature consecutive acts; a certain time, therefore, must be allowed for doing them; and where the statutes have not limited the time, it will be sufficient if they be done within a reasonable time.

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But an indorsement on the transfer of a ship in the same port, made upon the certificate of registry, and bearing date at the time of the transfer, but not signed by the vendor till three years after the certificate had been delivered up and cancelled, and had remained dormant all the intermediate time, was held not to convey a title under the 15 sect. of 34 Geo. III. c. 68.; For the object of the register acts in requiring an indorsement on the certificate, is in order to notify the change of property to the public; and therefore such indorsement must be made upon an existing acknowledged certificate in use at the time. (*k*)

Moss *v.* Mills.

Upon the sale of a ship at sea, it has been much questioned whether the purchaser, having omitted to comply with some of the forms of the acts, cannot make a title to the ship *per saltum*, by getting her registered *de novo* in another port where he resided at the time of the purchase, pursuant to the 7 & 8 Will. III. This point was first raised in Heath *v.* Hubbard, which gave occasion to several other cases, and produced a very elaborate investigation of the registry acts by all the judges in Westminster Hall. (*l*) The case was this:—Ward was sole owner of the Fishburn, belonging to the port of Newcastle-upon-Tyne.(*m*) On her outward voyage she was embargoed by the Emperor of Russia, in the spring of 1801. By bill of sale dated March 7, 1801, but executed on the 11th of April, Ward

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(*i*) Com. Dig. Condition C.

(*k*) Moss *v.* Mills, 6 East. 144. In this case the certificate had been cancelled and delivered up on the vendee's obtaining a register *de novo*, (issued without authority) reciting the cancellation of the former certificate.

(*l*) 4 East. 110.

(*m*) There were other points in the case which will be considered in another part of this work.

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Heath v. Hubbard, 4 East. 110.

assigned to the plaintiff Heath twenty sixtieth parts of the ship, in trust for certain underwriters. On the 14th of September following, Heath transmitted to the custom-house at Newcastle a copy of his bill of sale; and the officer caused an entry to be indorsed upon the affidavit on which the original certificate of registry had been obtained, and made the usual memorandum in the book of registers in that port; but no notice was given to the commissioners of customs till the 21th of January following. On the 9th of November, 1801, Ward, by a regular bill of sale, assigned the *whole* of the ship to the defendant Hubbard, who then resided in London; and on the second of January, 1802, registered the same ship *de novo* in the port of London. At the time of the assignment by Ward to the defendant, the grand bill of sale of the whole ship was delivered to him, and on the 19th of February he sold the whole of the ship by public auction. It appeared that the ship had never been in the port of Newcastle since she cleared outwards; but the embargo being taken off, she returned to Plymouth *after* the execution of the bill of sale by Ward to the plaintiff. But *before* the execution of the bill of sale by Ward to the defendant she sailed again, and was absent at the time of its execution. It was not till her return, of which the plaintiff had no knowledge, that the defendant obtained the new register; but no transfer of property appeared in any document at the custom-house at Newcastle subsequent to the entry on the 14th of September, 1801, and no indorsement of the transfer of one-third of the ship to the plaintiff was ever made on the original certificate of the ship's registry. Heath brought an action of trover against Hubbard, to recover one-third part of the ship, and the Court of King's Bench gave judgment for the plaintiff; being of opinion that he had complied with all the requisites of the statute, the ship not having returned to Newcastle, and had acquired a property under the bill of sale. They likewise thought that the bill of sale to Hubbard was void, on the ground of his omission to send a copy to the custom-house, at Newcastle.

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The next action connected with the above case, was an action of trover brought by the asssignees of Ward against the same defendant, to recover the remaining three-fourths of the same ship. All the facts of the case were again considered by the Court; and they determined that, under all the register acts, 7 & 8 Will. III. c. 22. s. 21.; 26 Geo. III. c. 60. s. 3, 4, 5, 16; and 34 Geo. III. c. 68. s. 15, 16, in order to make a title to a ship sold at sea, whether in whole or in part, such sale must be acknowledged by indorsement of the certificate of registry in the manner therein described; and a copy of such indorsement be delivered by the vendee to the persons authorized to make registry (which officers are directed to make an entry thereof, to be indorsed on the affidavit upon which the original certificate of registry was obtained, and to make a memorandum in the book of registers, and to give notice to the commissioners of customs,) and that it was not sufficient for the vendee to register such ship *de novo* in another port where he resided, though he had removed the ship thither, and though she had never returned to her original port after the sale. (*n*)

Bloxham *v.* Hubbard, 5 East. 407.

By reason, however, of some defect in their own title, as assignees, (*o*) the plaintiffs did not recover the whole property in the ship which they claimed. Another action was therefore brought against Hubbard, and the Court of King's Bench again gave judgment for the plaintiff. The facts of the case were, upon this occasion, put into a special verdict, and the cause was carried to the Exchequer Chamber by writ of error, and in that Court the *judgment of the King's Bench was reversed* by the opinion of five Judges against two. The majority of the Judges decided, that if a ship, registered at one port, be transferred, whilst at sea, to a purchaser residing at another port in this kingdom, the proper mode of perfecting a transfer within the requisitions of the registry acts was by a registration *de novo* in her *new port;* and that it was not neces-

Hubbard *v.* Johnstone, 3 Taunt. 177

(*n*) Bloxham *v.* Hubbard, 5 East. 407.

(*o*) Abbott. 63.

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sary for the ship to return to her former port in order to have a memorandum of the transfer indorsed on her certificate of registration; nor was it necessary for the purchaser to send a copy of the bill of sale to the ship's former port; nor to indorse a memorandum of the transfer on her certificate of registry within ten days after the ship's return to England. (*p*) They likewise decided, that the 34 Geo. III. c. 68. s. 16. applied to the sale of an entire ship in the same port, as well as to the sale of a share or shares therein; and Mr. J. Heath and Mr. Baron Wood were likewise of opinion, that the register acts, so far as they applied to defeat titles, and to create forfeitures, were to be construed strictly, as penal, and not liberally, as remedial laws. (*q*)

Policy of the decision of Hubbard *v.* Johnstone, in the Exchequer Chamber.

As the judgment of the Court of Exchequer Chamber was removed by writ of error to the House of Lords, (where the case is yet pending for judgment) it might seem presumptuous to review the grounds upon which it was given: a few words, however, may be necessary to shew that their judgment is, in every respect, conformable to the spirit of the registry acts, and framed upon such a construction of the system as is eminently conducive to accomplish its ends, both in a commercial and political point of view. In considering the propriety of this judgment, all the registry acts must be looked at as if consolidated in one system, and directed to one object; not to the imposition of forms, or the superinduction of unmeaning ceremonials upon contracts, but to secure to the state an immediate and direct knowledge of all the owners of British ships, and of all the transfers of pro-

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(*p*) This was decided by five Judges against two.

(*q*) Hubbard *v.* Johnstone, 3 Taunt. 177. Pending this proceeding in the Exchequer Chamber, the effect of a new register obtained in a port to which a ship had been transferred, was again brought under the consideration of the K. B., and it was again decided, that such new register alone was not a sufficient compliance with the statutes of registry; the Court thereby confirming their former judgment in Bloxham *v.* Hubbard. Hayton *v.* Jackson, 8 East. 511.

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perty affecting them; thereby excluding foreigners from all interest in them, and making a title to shipping a part, as it were, of our national muniments and records. The proposition, therefore, to be maintained, is, that if a ship, registered at one port, be transferred whilst at sea to a purchaser residing at another port, he may perfect the transfer by a registration *de novo* in her *new port;* and it is not necessary for the purchaser to send a copy of the bill of sale to her former port, in order to have a memorandum of the transfer indorsed on her certificate of registry. Now, the statute of 8 & 9 Will. III. directs the new registration of a vessel on a change of port, and in that case requires the old certificate to be delivered up; but when the property is changed in the same port, then the change is to be indorsed on the registry. This statute is the foundation of all the registry acts; and the distinction which it makes upon a new registration on a change of port, and an indorsement on the original certificate of registry, when the change takes place in the same port, is not repealed by any subsequent statute.

8 & 9 W. III.

26 Geo. III. & 34 Geo. III.

The 26 Geo. III. makes no alteration in this respect; but the 34 Geo. III. c. 68. adds new provisions for the better effectuating the purposes of the act of William. The fifteenth section directs what is to be done on any alteration of property in the same port; and the sixteenth section refers to alterations of property when the ship is at sea. It directs, that if vessels be absent from the port to which they belong, when any transfer takes place in their property, the sale is to be made by bill of sale, or other instrument in writing, as before directed by the 26 Geo. III. c. 60., and 34 Geo. III. c. 68. s. 14 & 15., and a copy of such bill of sale is to be delivered, and entry thereof indorsed on the affidavit, and a memorandum made in the book of registers; and notice given to the commissioners of the customs; and within *ten* days after such ship shall return to the port to which she belongs an indorsement is to be made on her certificate of registry, and a memorandum to be made as is before directed. Now it should seem that the fifteenth and six-

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teenth sections must be construed together, and that the latter section is dependent on the former; the fifteenth section regulating the mode of transfer when the ship is in the same port, and the sixteenth section prescribing the same forms, but (inasmuch as the indorsement on account of the ship's absence could not *then* be made on the certificate) requiring that it should be made within *ten* days after the ship's return to the port to which she belonged. Now, if the Legislature had intended that the 16th section should extend to all cases of transfer, and should repeal the provisions of 7 & 8 William, which not only permits, but requires, the new registration of a vessel on a change of port, it would have used explicit words. The sixteenth section can only fairly be construed to relate to the case of a ship being at sea or absent from her port, and *meaning* to *return to* such port; "because, according "to the interpretation of this clause by Mr. Baron Wood, "in his admirable judgment in Hubbard *v.* Johnstone, (*r*) "all the requisitions are put in the conjunctive, and the "last of them is an act to be done within ten days after "the ship's return. It is evident, therefore, that the "Legislature only contemplated a case where all the re"quisitions could be complied with. But it has even been "argued that the sale of a ship at sea cannot be made "good unless the ship actually puts herself into a situa"tion to comply with every one of these requisites, by "returning to her registered port. Such an interpreta"tion of the statute would be attended with monstrous "inconveniences to the public without any one benefit. "In that case, if a ship be registered abroad, in the East "or West Indies, and is sold in Great Britain, she must "be obliged to go back again to the East or West Indies, "to make an indorsement on her certificate, deliver a "copy of the indorsement, and then bring her certificate "to Great Britain, to be registered *de novo;* and for what "purpose; in order that her certificate may be cancelled "and destroyed, and a new one granted here when she is "registered *de novo.* Is it possible that any such thing

Hubbard *v.* Johnstone.

(*r*) 3 Taunt. 210.

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"could ever be intended? On the contrary, look at the "twenty-second section, and it is manifest that the Legis"lature meant otherwise, for it is expressly provided that "a ship, sold at sea, may either return directly to the "port to which she belongs, or to any other port, where "she may be legally registered, by virtue of the 26 "Geo. III. c. 60.; and that as soon as she returns she "may be registered *de novo*."

Hubbard *v.* Johnstone.

And again, in another part of his judgment he adds, "This case is the case of a ship transferred to another port, "in order to be there registered *de novo*, and where her "former certificate must be delivered up to be cancelled, "according to the 7 & 8 Will. III. c. 22. Here is no"thing to prohibit the owner of a ship from changing her "domicile from one port to another, and registering her "for trade there; a transfer of property to *another* port "means a sale to a person *living* at another port, who "removes her to *that* other port, and registers her there "*de novo*, as the port from and to which she is in future "to trade. This is conformable to the fourth and fifth "sections of the 26 Geo. III. c. 60. This is a ship, (the "Fishburn) whilst out at sea, sold to a person residing in "London, who takes her to that port, and there registers "her *de novo*. Here she gains a new settlement or domi"cile; and the port of Newcastle (her former registered "port) has nothing further to do with her. The instant "a bill of sale is executed, transferring her to another "port, the officers of her former port have no further "account to keep of her. Neither do I see any public "utility to be derived from delivering a copy of the bill "of sale to the officers of the port she had quitted. Her "identity and ownership (which are the objects of these "regulations) are fully ascertained to the officer of her "new port by the production of the bill of sale (which "must always recite her certificate of registry) and by "the delivering up of her old certificate, with all the "transfers of property indorsed upon it to the officer who

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"grants a new certificate. The object of the registry of "shipping, and of granting certificates, and making indorsements, was not to register titles for the security of "purchasers, but to guard (as the first statute expresses "it) against *colouring* foreign ships under English names, "and to furnish evidence to the officers of Government "that they were really English ships. Is not this sufficiently guarded by the provision contained in the twenty-"second section of the 34 Geo. III.? which requires, "when a ship is at sea when sold, that she shall perform "her voyage and return without delay either to the port "to which she belonged, or to some other, to be registered; otherwise she should be treated as a foreign ship, "and be subject to confiscation. Are not her identity "and ownership sufficiently ascertained to the officer who "registers her *de novo* in consequence of a sale, by producing to him the bill of sale, and delivering up her "former certificate with all the indorsements of transfers "of property upon it? Is she not by these means traced "from port to port from her birth, with sufficient certainty "to prevent foreigners from having the benefit of her "navigation? And I cannot see how the sending of a "copy of the bill of sale to the port she has quitted can "be of any public utility."

No equitable interest in British ships.

In the construction of the registry acts, it was decided in the very first cases which came before the Court, that the obvious policy of these statutes, as well as their plain and natural meaning, precluded all equitable titles or beneficial ownership in British ships, and regarded no other property than such as was *strictly legal* according to the requisites of the acts. Thus, in Rolleston *v.* Hibbert, already cited, the Court of Chancery concurred with the Court of King's Bench in deciding, that a bill of sale of a ship at sea, (void by the omission to recite the certificate of registry therein) intended as security for the payment of a note, could not be enforced by the vendee's retaining the ship, as having a lien on her, against

Rolleston *v.* Hibbert.

the assignees of the vendor, who became a bankrupt after the transfer; and the Lord Chancellor thought that the register acts were equally binding in a court of equity as in a court of law, and refused to compel the vendor to make a legal conveyance to the purchaser. (*s*)

No equitable interest in British ships.

No inchoate title, therefore, can be sustained in opposition to the words of the statute, which expressly declare, that no contract or agreement for an interest in ships shall be of any avail for any purpose whatever, either in *law or equity*, unless a bill of sale, &c. is executed according to the prescribed regulations. Therefore, in the case of the New Draper, the learned Judge of the Admiralty Court, in a cause of possession, decreed that the master should be dispossessed of a ship, who set up a virtual title to a majority of interest, on the ground of an *agreement*. In giving judgment Sir W. SCOTT observed: "Independent of any other objection, I do not think that under the act of Parliament it would be possible for the Court to recognise such a transaction; for the words of the act are as strong as they can be."(*t*) And in another case, where the legal title remained in A., who was in possession of a bill of sale, the Court sustained that title in opposition to an asserted equitable interest; "for this Court," said the same learned Judge, "is bound down to decide on the legal title, without taking notice of equitable claims." (*u*) So, likewise, in the very recent case of Brewster *v.* Clarke, in the Court of Chancery, a bill was filed for a specific performance of an agreement to purchase a ship, of which the plaintiffs were joint owners. The ship had been put up to sale by public auction, at which the defendant, Clarke, having agreed to become the purchaser, paid the deposit, and executed a memorandum of sale, reciting that the ship had been duly registered, and *a copy of the certificate of registry was actually annexed to the memorandum*. The

The New Draper.

The Sisters.

Brewster *v.* Clarke.

(*s*) Rolleston *v.* Hibbert, 3 T.R. 406. and 3 Bro. Ch. Ca. 571.

(*t*) 4 Rob. 291.

(*u*) Sisters, 5 Rob. 155.

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answer, (admitting that the defendant was in possession under this agreement,) raised objections to his title under the registry acts, viz. that the certificate of registry was not duly recited in the memorandum, or instrument of sale, according to the 26 Geo. III. and 34 Geo. III. The Lord Chancellor refused the motion, stating that the policy of these acts prevented a Court from looking on any one who had *not strictly* complied with their provisions in the light of a purchaser. (*w*)

No equitable interest in British ships.

Camden *v.* Anderson.

Indeed, if an equitable interest could prevail, in contradistinction to a legal interest, it would tend to defeat all the salutary policy of these acts; (*x*) and though an equitable interest may, in many instances, be protected by an insurance, the Court of King's Bench refused to sustain such an interest in a ship, though in an action upon a policy on freight. Therefore, where two partners purchased a ship under a bill of sale, conformably with the registry act, and afterwards took in two others partners, but there was no transfer of the ship to them jointly with the others, they held that the four partners had not any insurable interest in the freight. For they considered the right to freight as resulting from the right of ownership, and that these partners had neither a legal nor an equitable title to the vessel. (*y*) But it is clear, that if, previously to these acts of Parliament, a partnership of four had bought a ship in the name of one or two of them, or in that of a stranger advancing them money, they would in equity have been the owners of that ship, and might have recovered in a policy of insurance upon her; for a court of law, in actions on a policy of insurance, will take notice of the doctrine of trusts, holding that the trustee has, in respect of the legal interest, an insurable interest, as it was always held that the *cestui que trust* has in respect of the equitable interest.

(*w*) Brewster and Others, *v.* Clarke and Others, 2 Merivale, 75.

(*x*) 4 Robinson, 291.

(*y*) Camden *v.* Anderson, 5 T. R. 709. See likewise Stringer *v.* Murray, 2 Barn. & Ald. 218. *Post.* 317.

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It is not, however, to be inferred from the above case, that the property in the ship and the property in the freight are convertible terms; the property in the freight may be distinct from that in the ship, and the interest in the ship may be in one, and the freight in another. An assignment of the freight alone is not within the registry acts, and does not require any of its forms.(z) But where A., B., and C., agreed to purchase a ship, and that it should be registered in the names of A. and B. only, but the profits of the ship to be divided amongst the three; and C. filed a bill against A. and B., for an account of the freight and earnings of the ship, on a general demurrer, the Vice-Chancellor held that agreement to be illegal. "No doubt," he said, "a title to freight may be acquired by assignment: but this is an agreement that three shall buy a ship, and that it shall be registered in the name of two only, and that the three shall share the profits of the ship. The case is new. My opinion is, that, on grounds of public policy, such an agreement cannot be permitted. It is a stipulation contrived for the purpose of escaping from the provisions of the registry acts." (*a*)

Assignment of freight alone not within the registry acts. See *post*, 318.

A case under very similar circumstances to Camden *v.* Anderson came before the Lord Chancellor in a case of bankruptcy, when his Lordship, reviewing and confirming the previous cases in courts of law, decided, that ships purchased by one partner in the name of the one partner only, who became a bankrupt, and was the sole registered owner, were to be considered separate property as between the joint creditors of the bankrupt and his deceased partner in trade. In this case his Lordship observed, that where the interest in a ship is derived under a party's own act and contract, not executed according to the registry acts, it cannot be reformed in equity, any more than an annuity deed, not pursuing the forms of the annuity

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(z) Mestaer *v.* Gillespie, 11 Ves. 636.

(*a*) Battersby *v.* Smith, 3 Madd. 114.

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act. "The case," he said, "requires this; that if a man enters into a partnership, where one of the articles is a ship, there must be a *new* registry."(*b*)

About six years after the decision in the above case, the registry acts, and their operation upon property, both equitable and legal, were again brought before the attention of Lord Eldon. Their general effects, and commercial results, had now been fully felt by the country. If they had required any alteration in important points, the legislature, always vigilant over the extensive interests which they embraced, would, doubtless, have amended them; but they were suffered to continue without any qualification or repeal; a plain proof, that the able statesmen of that time considered the construction which had been put upon them in courts of law and equity to be a sound and rational one. The case before Lord Eldon was this:—Henry Cooke and John Herbert, partners and merchants in London, contracted to purchase the ship Euphrates, for 20,000*l.*; and, accordingly, in May and June, 1805, they accepted bills of exchange, drawn on Messrs. Clay, owners of the ship, for that amount; and, as a collateral security, Cooke and Herbert being each possessed of five sixteenth shares of the ship Devonshire, by bill of sale, dated the 22d of June, 1805, severally assigned their shares of that ship and the policies of insurance, effected by them on such shares, by a defeasance of the same date, reciting the purchase of the Euphrates, as made by Cooke and Herbert, and declaring those policies to be for further securing the 20,000*l.* Philip Herbert, the brother of John, agreed with his brother and Cooke, to purchase one-fourth of the ship; and, accordingly, a bill of sale of one-fourth was made to Philip Herbert, who gave security to Cooke and Herbert for the price of one-fourth of the ship and her outfit. A bill of sale of the remaining three-fourths

Ex parte Yallop.

(*b*) Curtis *v.* Perry, 6 Vesey, Jun. 746.

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was made to Cooke alone; and the usual indorsements were made on the certificate of registry under the register acts; declaring that Messrs. Clay had sold three-fourths of the ship to Cooke, and one-fourth to Philip Herbert. The ship was taken up by the East India Company, and her outfit, amounting to 7672*l.*, was furnished by Cooke and Herbert, jointly; and insurance was made by them jointly, on three-fourths of the ship, as their joint property; the shares were treated in their partnership books as their partnership property; their commission, as managing owners, was debited to the ship in their partnership books; and every act was done, short of an actual conveyance and registration in their names, which could mark those three-fourths of the ship as the joint property of Cooke and Herbert. On the 8th of July, 1805, a new register was taken out by Cooke and Philip Herbert; and they were declared to be the owners, and Philip Herbert the master. Cooke, after the departure of the ship, made over by bill of sale several small shares, as security for separate debts of himself, and joint debts of Cooke and Herbert. In December, 1805, a joint commission of bankruptcy issued against Cooke and John Herbert. Their acceptances on account of the purchase-money of the ship had been paid, to the extent of 7500*l.* The sum of 12,500*l.* remaining due to Messrs. Clay, was claimed as a debt against the joint estate of Cooke and Herbert. The assignees sold the three-fourths of the ship for 7175*l.* The petition was presented by a joint creditor of Cooke and Herbert, praying an application of the three-fourths of the ship, and the produce, as their joint property. The Lord Chancellor, in giving judgment, observed, that a decision that their interest in a ship should be taken as joint property, if the question arose in a contest between the partners themselves, would destroy the whole effects of the registry acts. "These acts," he added, "were drawn upon the policy, that it was for the public interest to receive evidence of the title to a ship from her origin to the moment in which you look back to her history;

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how far throughout her existence she has been British-built, and British-owned; and it is obvious, that if, where the title arises by act of the parties, the doctrine of implied trust in this Court is to be supported, the whole policy of these acts may be defeated; as neutrals may have interests in a ship, partly British-owned; and the means of enforcing the navigation laws depend upon knowing from time to time who are the owners, and whether the ship is British-owned and British-built. Upon that the legislature will not be content with any other evidence than the registry; and requires the great variety of things prescribed by these acts. *They go so far as to declare, that notwithstanding any transfer, any sale, or any contract, if the purpose is not executed in the mode and form prescribed by the act, it shall be void to all intents and purposes.* The consequence, established by positive and repeated decisions, is, that upon a contract for the purchase of a ship, which it may be supposed might have been executed without public mischief, though by force of that contract, and by operation of law, the purchaser would be the owner in equity from the moment of the purchase, and the vendor from that moment would be divested from all interest,—yet it is decided, that these acts are so imperative that if they rest upon the contract, it cannot be said of a ship, as of an estate, that by operation of law, and by force of the contract, the ownership is changed; and if the money had been paid, the decision would be upon the same principle; and it must be recovered by another form of proceeding."

Difference between a title to a ship by contract of parties, and operation of law.

But his Lordship, in another place, observed, that there is a wide difference between the title set up under the contract of the parties, and under the operation of law, or the act of God; and that is authorized by a fair construction of the act of parliament. Speaking of transfers, his Lordship said; "The act could not be intended to apply to transfers that could not be carried through in the mode and by the means prescribed: the transfer, for instance, from a testa-

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tor to his executors; or the transfer to assignees, in bankruptcy. The next of kin, or residuary legatees, take by operation of law, not under a contract for transfer, capable of being carried into execution in the modes prescribed. A transfer of that description, therefore, is not that species of transfer, the regulation of which was in the contemplation of the legislature; but if the transfer is of that species which was the subject of regulation, the legislature expects obedience from all parties contending for interests and title under such acts of transfer. The argument of the joint creditors must go to this extent, that if these partners had not purchased this interest in the ship in the name of one of themselves, a circumstance not material, but a stranger had made the purchase, advancing the money of the partners, and they had permitted the bill of sale to be made in his name, he swearing that he was the sole owner, and the registry being made by him as such,—as the partnership advanced the money, therefore, notwithstanding all this parliamentary regulation, upon principles of public policy, with regard to the mode in which, for the benefit of the public, that property was to be acquired, they are to be considered the owners; as if the subject of the contract had been an estate. That is directly inconsistent with the act of parliament; that, if it could prevail, instead of securing the evidence which the public was intended to have, how far the ship, through every period of her existence, was British-owned and British-built, it would be the easiest thing to cover the ownership of neutrals and enemies, without a possibility of detection by means of the act; which was intended to furnish decisive and incontrovertible evidence of those facts."

His Lordship concluded by stating,—"Upon the first question made by this petition, whether by the manner in which this ship was dealt with, it is partnership property? My opinion is, that no such dealing in the partnership could possibly make it partnership property, as between the partners; as that would be a direct infringement of

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the act of parliament. A distinct question is, whether, though it cannot be so taken as between the partners themselves, the ship, if dealt with in that manner, ought not, upon the statute of King James, to be considered as partnership property; whether it was so held, that the joint creditors can say it was partnership property before the bankruptcy; or, on the other hand, the title being of a public registered nature, that public registry must not decide, as among all mankind, where the property is. My opinion is, that the registry is the evidence of the property; and must be taken to be the evidence of it, even among the creditors. Upon every ground, therefore, this petition must be dismissed." (*c*)

Ex parte Gribble.

The bankruptcy of these two persons gave rise also to another case before his Lordship, respecting certain shares of the ship Devonshire. At the time of the bankruptcy five sixteenths were registered in the name of Cooke, and five others in the name of Herbert; the dispute regarded the latter. The joint creditors claimed them, on a suggestion that the whole ten were originally purchased on the joint account, though taken in the name of Cooke alone, and that five had been transferred to Herbert, on his remonstrance; but it was admitted that this claim could not be distinguished from the case last quoted. The separate creditors of Herbert relied on that case as decisive in their favour. The separate creditors of Cooke suggested that he was the original purchaser, and had been prevailed upon by Herbert to execute a bill of sale to him of these shares for a nominal consideration, of which no part was paid; and contended, that the interest in them still continued, on that account, to be the separate property of Cooke. The matter came before his Lordship upon petitions and affidavits, which were contradictory to each other. At the hearing his Lordship said, " There is no doubt that previously to the

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(*c*) Ex parte Yallop, 15 Vesey, 60.

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registry acts if Cooke had purchased this ship in the names of himself and Herbert, Cooke paying the whole money, and no partnership existing between them, he who paid the money would have been held the equitable owner. (*d*) But, consistently with the decision of Camden *v.* Anderson I do not see how it can be represented that the property in this ship stood otherwise than in one of these partners, as to five sixteeenths, and the same proportion in the other." On a subsequent day his Lordship observed—" The ground of the petition by the separate creditors of Cooke is, that the assignment to Herbert was made for a nominal consideration; but it was made in fact, and the ship was registered accordingly." And then, again adverting to the case of Camden *v.* Anderson, he added, " If, therefore, Cooke, having the entire interest in himself, registered in his name, by his own act made Herbert the owner of this proportion of the ship, permitting the registry to be made in Herbert's name, it is impossible to maintain that Herbert's estate is accountable to the estate of Cooke for the produce of that property." His Lordship then said, " I will give an inquiry, if those who represent Cooke desire it, *when* the bill of sale was made to Herbert, and *whose* money was advanced; *but let the result be what it may, I do not conceive that the title of Herbert could be dislodged by the nature of those advances.*" (*e*) It does not appear that the creditors of Cooke pursued their claim any further.

The cases on this head are very numerous both in law and equity, but the construction of the acts has uniformly been the same. And it being the obvious intent of the registry acts, that no one should have the use and employment of the ship, whose name might not be discovered by reference to some public document, the courts will not

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(*d*) Ex parte Yallop, 15 Vesey, 60.

(*e*) Houghton, ex parte, Gribble, ex parte, 17 Vesey, Jun. 251; and Abbott on Shipping, 73.

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Wilson *v.* Heather, 5 Taunt. 642.

suffer a trust or mortgage of a ship to prevail under any colour whatever, whether in the nature of lien or deposit. Therefore, where the owner of a vessel, upon receiving a loan of 200*l.*, deposited her in the hands of a broker, and executed a bill of sale to him, wherein was an indorsement, *that the assignment was made as a lien or security for the loan on the vessel, and that the broker should immediately sell and execute a lawful bill of sale of her to the purchaser, and, after retaining the loan, commission, and charges, pay the surplus to the owner,* but the requisites of the registry acts were not pursued; the Court of Common Pleas held, that this did not constitute a lien, but a mortgage, and was therefore void under the registry acts; and that the broker could not retain the vessel until the payment of the loan. (*f*) Notwithstanding the above cases, it is not to be concluded that there can be no valid mortgage of a ship, and that the owner cannot make any transfer of property without passing entirely and irredeemably with all his interest. The mortgage of a ship, like the mortgage of any other chattel, may take place, subject to the restrictions laid down in courts of law and equity relative to such mortgages. The main and fundamental principle as respects property in shipping is this,—that there can be no valid mortgage without complying with all the forms of the register acts. But if these forms are complied with, the mortgage of a ship, whether at sea or in port, will be sustained as a valid security. Before the registry acts, ships were constantly mortgaged; and the free transfer of property in shipping, as in other subjects of trade and commerce, encouraged. These acts were intended for the benefit of commerce, and not meant to operate so as to deprive the owners of their former right of raising money by mortgage.

A mortgage of a ship is valid, if the forms of the registry acts be complied with.

In the case of Thompson *v.* Smith, (*g*) the Vice Chan-

(*f*) Wilson *v.* Heather, 5 Taunt. 642.

(*g*) 1 Madd. 399.

When mortgages on ships are valid, &c.

cellor, Sir T. PLUMER, commenting upon an observation which had been thrown out at the bar, that since the registry acts an agreement to reconvey a vessel, pledged for a debt, was merely honorary, and that there could be no mortgage of a ship, is reported to have said, "Such a proposition, publicly stated, calls for immediate reprobation; and is totally without foundation. The acts only meant to confine the ownership of ships to British subjects, and were not intended to have any effect upon the right of mortgaging. A transfer by mortgage, *made known to the public, and confined to British subjects*, is within the spirit of the acts; nor is there any thing in the letter to confine the transfer to an absolute sale. Ever since the passing of the 7th and 8th William, and the more recent statutes, it appears, from many cases in law and equity, to have been admitted that a ship may be mortgaged, and no doubt has ever been suggested on the subject. (*h*) In Hibbert *v.* Rollestone, and Mestaer *v.* Gillespie, there were mortgages of the ship and no objection made on that account. In the late case of Wilson *v.* Heather, (*i*) in the Common Pleas, the court considered the mortgage of a ship as valid, provided the forms required by the registry acts are attended to. Indeed, the terms of the statute plainly shew that there may be an equitable title in a ship, for the terms '*contract and agreement*' will obviously embrace such a title. The act says, (*k*) 'No transfer, *contract*, or *agreement* for transfer, of any property in a ship, shall be valid and effectual, either in law or equity, unless such transfer, contract, or agreement, &c. shall be made by bill of sale or instrument in writing,' containing such recitals as the clause prescibres. To say, therefore, that there cannot be an equitable title in a ship is to contradict the words of the act."

Thompson *v.* Smith, 1 Madd. 399.

(*h*) In King *v.* King, 3 P. W. 360, mention is made of a decree of Lord Harcourt, on the mortgage of a ship at sea, which ship was taken, and the executors of the mortgagor were decreed to pay the money for which the ship was mortgaged.

(*i*) See *ante*.

(*k*) 34 Geo. III. c. 68. sect. 14.

Indorsement adapted only to a total transfer.

It must be admitted, however, that the form of indorsement on the change of property in a vessel is adapted only to a total and absolute sale, and will not apply to a transfer by mortgage; the mortgagor not being properly within the term "seller," nor can he truly declare (as the form of sale requires,) that he has *sold* all his interest, &c. in the ship; nor is the mortgagee properly a purchaser.(*l*) At the Custom House, the officers will not permit any entry but according to this prescribed form; the statute not having provided for a deviation from it in any case, nor allowing any sale to be valid without a strict observance of it. The consequence is, that where a ship is mortgaged, the practice has usually been to have two instruments; one, an absolute conveyance of the ship; the other, a deed of defeasance; the *former only* being registered at the Custom House. Consequently, in such a case, a difficulty arises in enforcing in a court of justice the mortgagor's right of redemption, by setting up the unregistered deed in opposition to the registered title; and from this circumstance has arisen the notion, that, since the register acts, no transfer of property in a ship could be made, except by way of absolute sale; and, consequently, that no valid mortgage could be made since these acts. But this course of reasoning is founded on mistake. In the case of Thompson *v.* Smith, just cited, this objection is very learnedly combated by the present Master of the Rolls.(*m*) "If the fact," he says, "were established, that the form of registry prescribed by the acts were applicable only to the case of an absolute sale of a ship, and could in no way be suited to a transfer by way of mortgage, still it would not follow, as a consequence, that no other than an absolute sale was intended to be allowed, but merely that the provisions of the act should be deemed to apply only to an absolute sale, leaving all other transfers of property untouched by the acts, and to

Of the mode by which the mortgage of a ship may be effected.

(*l*) See the very learned judgment of the Master of the Rolls on this subject, 1 Madd. 399.

(*m*) 1 Madd. 411.

be governed by the same rules and forms which prevailed before the acts were passed; there being nothing either in the letter or spirit of the acts unfavourable to the continuance of the mortgage of ships; and it being utterly unreasonable that such mortgage should be considered invalid merely from the non-compliance with a form of register, which, according to the hypothesis, could in no way be adapted to it. It is impossible not to see that the greatest inconveniences would arise if either of these alternatives prevailed, if any prohibition or restraint were imposed on the right of mortgaging ships, or if the guards provided by the register acts against foreigners acquiring an interest in British ships did not extend to this mode of transfer of property. It is, therefore, of great importance to have it clearly understood, that for neither of these positions is there any foundation. The contrary of both is assumed in the late case of Wilson *v.* Heather, decided by the unanimous opinion of the Court of Common Pleas, without any doubt on either point; and in that opinion I entirely concur. I have no doubt that the power of mortgaging a ship exists as fully since the register acts as it did before, provided the requisites prescribed by the register acts are observed. I think there is no difficulty in effectuating this. The mortgage will be made by the usual bill of sale of the ship, containing in the same instrument a defeasance, or condition of retransfer or payment of the mortgage money. This bill of sale must contain the recital of the certificate, as the act directs; and must be fully indorsed on the certificate of registry, if the ship be in port; or if at sea, a full copy of it must be transmitted to the Custom House. The form of indorsement will be the one prescribed by the act, but with the addition of the defeasance, to express the true nature of the contract between the parties, whenever it becomes material to resort to evidence of it. There is nothing in the act to prevent such an addition being made to meet the exigency of the case. A greater deviation from the form prescribed by the act was sanctioned by the

Thompson *v.* Smith, 1 Madd. 399.

Power of mortgaging ships not taken away by the registry acts.

Thompson *v.* Smith, 1 Madd. 399.

Court of Common Pleas, in the case of a partial transfer of the interest in a ship; (*n*) and an ingenious living writer (*o*) has well observed, that the act seems to require a similar deviation in the case of a mere contract for the sale of a ship, which the act directs to be registered, but which cannot be in the exact words of the form prescribed. A liberal interpretation of the act must be adopted to make the forms give way to substance. In the subsequent forms to be observed at the Custom House, the defeasance will probably not be noticed either in the entry indorsed, or the oath, or in the memorandum made in the book of registers: but, adhering simply to the form prescribed by the act, it will be registered as an absolute bill of sale. But neither the mortgagor nor mortgagee can suffer by that omission. The statutes invalidate the transfer only in the event of a neglect of the prescribed requisites *by the parties*, not for any mistake or neglect by the *public officers*. And in the event of any dispute of the title in a court of justice, the proper evidence of title will be the original documents themselves, not any imperfect abstract made of them at the Custom House. By that abstract, the mortgagee will, it is true, appear the sole and absolute owner, and so he is, *pro tempore*, till redemption; but the mortgagor's right to call for a re-transfer will appear from the bill of sale fully indorsed on the certificate, if the ship be in port; or if at sea, by a full copy transmitted to the Custom House; and I see no ground on which that right can be resisted." In the above case, therefore, the mortgage was deemed to be valid, and an injunction granted in order to prevent an improper indorsement on the certificate of the registry of the ship.

Neglect of the public officers of the prescribed forms of the registry acts, will not invalidate a sale or mortgage.

The decision in this case is of the utmost importance, and seems in perfect conformity with the letter and spirit of the acts. It would, undoubtedly, be a hardship, and a

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(*n*) Underwood *v.* Miller, 1 Taunt. 387.

(*o*) Abbott on Shipping, p. 44.

Policy of admitting mortgages of ships

great practical inconvenience to ship-owners, if the smallest sum could not be borrowed upon the most valuable vessels without a total alienation of all interest in them. All that public policy requires is, that the trust and use of the ship should not be in *one*, and the property in *another;* and that no one should have a title to British shipping unless his name be registered according to the forms of the act, and the property conveyed to him by bill of sale or other instrument and writing, with such superadded forms as the statute requires, according to the particular circumstances of the contract. This security being taken, the public demands no more. As between the public and the mortgagee there is no concealment. He must appear (or his title is wholly inoperative) as the absolute owner; and so he is, legally: but, as between him and the mortgagor, there may be an obligation to reconvey the ship upon the satisfaction of the debt. If the covenant to re-transfer be by a separate deed, a court of equity will not decree a re-conveyance unless the forms of the registry acts have been strictly complied with. Again, if the defeasance, or covenant to reconvey, be contained in the original instrument, whether it be a bill of sale, or otherwise, the whole transaction must appear by the indorsement on the ship's certificate of register, the memorandum made in the book of registers, and the notice which is required to be given to the commissioners of customs. The condition to reconvey, so long as it is only between persons *equally* entitled to be sole and absolute owners of British ships, cannot interfere with the public policy of these acts. He that has a right to alienate the whole, has a right to stipulate for an alienation modified by the condition of a privilege of re-purchase. A ship may be taken in execution by a judgment creditor; and whilst in the hands of the sheriff, the owner, upon the payment of the amount of the levy, may have it delivered up to him. There is no better reason for prohibiting a mortgage than for prohibiting an execution. In a word, all the statute requires is publicity,—a knowledge of the

Policy of admitting mortgages of ships.

real transaction, and a registration of all the modes of transfer, and of all the contracts and agreements touching the property in British shipping. After all, however, the objection seems rather in the terms used than in the contract itself. In strictness, when a ship is conveyed as a security for a sum of money, with a condition to reconvey upon re-payment, such transaction is not properly a mortgage. It is an absolute conveyance, liable to be defeated by a condition subsequent; and the borrower cannot avail himself of this condition of re-transfer but through the medium of a court of equity; inasmuch as the forms of the registry acts require the lender to stand forth to the public as the legal and absolute owner, and to be regarded as such. Courts of equity, which always consider the real nature of a contract, whether it be a sale or a mortgage, will doubtless decree a re-transfer upon the satisfaction of the debt; but, then, they will guard the public policy of the register acts by refusing to entertain any suit for a re-conveyance, where any of the material requisites of the statutes have been wanting. But the lender, who has taken, and must take, an absolute conveyance, and be registered as the owner, has all the legal title to the ship in the mean time, until compelled by a court of equity to re-convey her to the borrower. The transaction, therefore, as we have above said, though it have many of the properties of mortgage, and must be dealt with in equity as a mortgage, is in strictness an absolute sale, with a covenant either by another deed, or in the same deed, to re-sell or re-convey upon certain terms; but the public, having the security of the register acts, cannot suffer in any of the interests which the policy of those acts protects by the subordinate contract; which, as respects them, must be a matter of perfect indifference.

In all cases which have come before them, the courts of equity have jealously watched over the execution of these acts, and have invariably refused relief, on the alleged ground of accident and fraud, where the forms of registra-

Where the forms of the registry acts are not complied with, no relief in courts of equity, on the ground of accident or fraud.

tion have either been evaded or omitted. Thus, in two cases before the late Master of the Rolls; (*p*) Newnham *v.* Graves, and Barker *v.* Chapman. In the former case, the circumstances were as follows: (*q*)—On the 23d of April, 1808, Dawson and his partner, for a valuable consideration, assigned to Bland and his partner a ship, called the Venus, by a proper bill of sale. The vessel was then at sea. A copy of the bill of sale, with notice, was duly sent to the commissioners of the customs, according to the act 34 Geo. III. c. 68. In May, 1808, Bland and Co. became bankrupts, and the plaintiffs were appointed assignees. In the same month Dawson and Co. became bankrupts, and Graves and another were chosen assignees. On the 31st of July, 1808, the vessel arrived in London, to which port she belonged. The plaintiffs immediately took actual possession, and applied to the captain for the certificate of the registry, to get it indorsed within the ten days after the arrival of the ship, as required by the act: but the captain, in collusion with the assignees of Dawson, delivered it to them; and it was admitted that application had been made to the assignees of Dawson to direct the captain to deliver the certificate within ten days, and that they refused to do so, conceiving that they were not bound to do any act to assist the plaintiffs in making perfect their title. *The Master of the Rolls* was of opinion, that the registry act precluded the court from giving any relief, and dismissed the bill, but without costs.

Newnham *v.* Graves, 1 Madd. 399.

In Barker *v.* Chapman and others, assignees of Robson, it appeared that on the 3d of March, 1812, the bankrupt Robson had executed a bill of sale of the ship Bacchus to the plaintiff, and made an indorsement on the registry in the presence of two witnesses, and sent the instrument

Barker *v.* Chapman, 1 Madd. 399.

(*p*) Sir William Grant.

(*q*) Newnham and others, assignees of Bland and others, *v.* Graves and another, assignees of Dawson and another, 1 Madd. 399, in *notes*.

Barker *v.* Chapman, 1 Madd. 399.

to the broker; but, from inadvertence or design, the witnesses had not signed the attestation, and it was sent back to Robson to get the proper attestation, but he detained the same till he became bankrupt, and the assignees refused to deliver up the bill of sale. The Master of the Rolls dismissed the bill, so far as related to the ship Bacchus, but without costs.

Thompson *v.* Leake, 1 Madd. 39.

So, likewise, in another case, the Vice-Chancellor, Sir Thomas Plumer, decided in conformity with the above cases, that if on the sale of a ship there was no bill of sale or indorsement on the certificate, no relief could be given in equity on the ground of accident and fraud. In this case, that learned Judge observed, that in Barker *v.* Chapman, just cited, there was gross fraud in preventing the ship's register from being indorsed, within the time prescribed by the act, after the ship's return to her port. "And yet," he adds, "the Master of the Rolls, Sir William Grant, with much reluctance, and after a year's delay of his judgment, in hopes that the parties would compromise, decided that he could not relieve. In that case there was no appeal. It is, therefore, an express determination that fraud is not relievable in these cases."(*r*)

Dixon *v.* Ewart, 3 Merivale, 322.

The Courts, however, have not so rigidly insisted upon these requisites, as to suffer them to supersede plain and obvious rights which wanted something of their formal completion: therefore, where a power of attorney was given to sign an indorsement on a certificate, the Lord Chancellor decided, that it was not revoked by the bankruptcy of the vendor, subsequent to the execution of the power, but previous to the indorsement. His Lordship considered it as a power to execute only a mere formal act, which the bankrupt himself might have been compelled to execute, notwithstanding his bankruptcy; and he decided, that an indorsement on the certificate, made

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(*r*) Thompson *v.* Leake and others, 1 Madd. 39.

within ten days, by virtue of such a power of attorney, (the grantor of which had since become a bankrupt) was a sufficient compliance with the registry acts. (*s*)

Case of Palmer *v.* Moxon reviewed, and the principle confirmed by the Lord Chancellor, 3 Meriv. 322.

The case to which we have referred is more important upon another consideration, as the Lord Chancellor therein confirms the judgment of the Court of King's Bench in Palmer *v.* Moxon; (*t*) and, in conformity with that decision and the previous one of Hubbard *v.* Johnstone, (*u*) decided, that a bill of sale passed the absolute property of a ship at sea, subject only to be divested in case the indorsement on the certificate of registry were not made within ten days after the ship's return to port. The Lord Chancellor's judgment in this case cannot, with any propriety, be omitted. The facts of the case are not important; but, in adverting to the arguments at the bar, his Lordship says, "I am glad to have been referred to the case of Palmer *v.* Moxon; for I thought something had been said on this subject in the courts of law, since Moss *v.* Charnock, upon which I formerly observed in Mestaer *v.* Gillespie. (*x*) It strikes me very forcibly that the principle must be similar to that of the cases under the annuity act, (*y*) by which it has been decided that the grant of the annuity passes the ownership instantly, subject to be divested in case of noncompliance with the provisions of the act by inrolment within the twenty days thereby limited; and this appears to be Lord ELLENBOROUGH'S opinion in Palmer *v.* Moxon; for I cannot think that the decision of the Court of King's Bench in that case can be satisfactorily accounted for by the doctrine of relation. The ship might have been taken in execution within the ten days; but the property must be in actual possession when execution is executed; and, therefore, if the property were not passed by the bill of sale, there could be no valid execution. There

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(*s*) Dixon *v.* Ewart, 3 Merivale, 322.

(*t*) See *ante*, p. 284.

(*u*) See *ante*, p. 283.

(*x*) 11 Vez. 637.

(*y*) 17 Geo. III. c. 26.

Dixon *v.* Ewart.

is no doubt that there can be no such thing as an equitable title to a ship; and the case before the Vice-Chancellor (*z*) is, as to this, also very material. When the former act (*a*) passed, there was not sufficient attention paid in framing its enactments to what might be its effect upon the principles adopted in Courts of Equity; and it was to remedy that deficiency that the last act was introduced, (*b*) by which it is now completely established, that there can be no such thing as the equitable ownership of a ship. *I well know that a bill does not lie to compel the execution of the indorsement after the ten days are expired:* but, if it were possible for the plaintiff to bring his case before the Court, within the time limited; Would the Court refuse to entertain it? Or, if the Legislature had given twelve months instead of ten days, would the Court refuse to aid the party in such a case by the exercise of its jurisdiction, to compel the specific performance of an agreement? I cannot imagine that the Legislature meant to declare, that there may be a sale of a ship at sea, but that there shall be no means, either at law or in equity, of compelling the execution of those formalities which it has directed to accompany the transfer. (*c*) The Legislature could not have meant to deny to the suitor, in such a case, the advantage of equitable relief. Its meaning must have been, to give the party an inchoate right to the property which is the subject of the assignment." His Lordship subsequently observed,—"When this case was before me, I considered that there are some important points of law which will be involved in its decision; and resolved, before I did any thing further, to have the opinion of some other Judges upon these questions. I have since received from Mr. Justice ABBOTT, now on the Circuit, a note, containing the opinion of himself and the Lord Chief Justice

No bill lies to compel the execution of an indorsement on a ship's certificate of registry after the time given by the statute. But *semble*, that equity will afford relief by compelling the execution of the formalities of the register acts, where there is an inchoate title in the vendee; if he apply within the proper time (where the time is fixed by law) or, within a reasonable time, where it is left indefinite.

(*z*) Thompson *v.* Smith, 1 Madd. 395.

(*a*) 26 Geo. III. c. 60.

(*b*) 34 Geo. III. c. 68.

(*c*) See the case of Mestaer *v.* Gillespie, 11 Vez. Jun. 621, and the cases commented upon in Abbott, p. 77.

of the Common Pleas, (Sir VICARY GIBBS) which is, in substance,—That the transfer of a ship at sea, if all the requisites of the registry acts have been duly complied with at the time of the transfer, vests the property in the vendee, subject only to be divested, upon the neglect of the vendor to make the indorsement on the certificate of registry within the ten days after the return of the ship into port. That, if a bankruptcy intervene before the arrival of the ship, the indorsement being only an act of duty on the part of the vendor, and passing no interest, may be performed by the bankrupt himself. And that, (as in this case) if the vendor have given a power of attorney to perform this act of duty previous to the bankruptcy, his attorney may carry it into effect, notwithstanding the act of bankruptcy has intermediately occurred. This is the opinion which these Judges have given; and on the authority of their communication I shall act as if it were the settled law of the case, which, indeed, upon looking into the acts of Parliament, and considering the opinion delivered to me, I think that it is. But, if any of the parties should think otherwise, and should choose, after this, to have a case for the decision of a court of law, I will give it them." Dixon *v.* Ewart.

But as the law, as we have before observed, requires the registration of ships as an object of national policy, it considers all contracts and trusts for them void, if the forms of registration be not complied with, however peculiar the circumstances of the case may be as between the *parties* themselves. Therefore, where A., having contracted for a ship to be built for him in the East Indies, agreed, during the time of its building, to sell a share to B.; and B. paid a part of the price in pursuance of the agreement; and afterwards, on the ship's arrival in England, A. caused her to be registered, and accounted with B. as part owner; but B.'s share was never on the register as part owner; the Court of King's Bench decreed that B. had no legal interest in the ship. Stringer *v.* Murray, 2 Barn. & Ald. 248.

The Registry Acts are imperative only upon the voluntary transfer of parties, not on titles arising by operation of law.

But it will be necessary, in all cases on the registry acts, to observe the distinction, that trusts implied, or arising by operation of law, are not within the meaning of the statute. The registry acts are imperative upon voluntary contracts between party and party only; but are not so upon transfers which are made by the act of the law, or by causes independent of the immediate will of the parties. Thus, assignments by commissioners of bankrupts to assignees under the bankrupt laws, and titles passing to executors and administrators, in case of death, are not that species of transfer, the regulation of which was in the contemplation of the Legislature. (*d*) With respect to executors, administrators, or next of kin, the immediate point has never, we believe, come before the Court; but in the case of Bloxham *v.* Hubbard, the Court of King's Bench had no difficulty in deciding, that these acts had no application to cases of transfer by operation of law, such as from the commissioners to the assignees of a bankrupt trader. (*e*)

Notwithstanding the bill of sale of a ship may be void, a party may have a remedy on a collateral covenant contained in the same instrument.

We have already had occasion to observe, that an assignment of freight was not within the provision of these statutes, and that although the bill of sale of a ship might be void by a neglect of the proper forms of these acts, a contract for freight, or an assignment of freight, might be valid, and capable of being enforced in law or equity. And it would, we apprehend, make no difference whether the assignment of freight were contained in the same instrument, which was void as to the ship, or in a different instrument. (*f*) A point, which resembles in substance the case above put, has been decided in the Court of King's Bench. The decision of the Court was, that though a bill of sale for transferring the property in a ship, by way of mortgage, might be void as such, for the omission of reciting the certificate of registry therein, yet the mortgagor

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(*d*) 6 Vez. Jun. 739. 15 Vez. Jun. 68.

(*e*) 5 East. 407.

(*f*) See *ante*, p. 299. and Spledt *v.* Lechmere, 13 Vez. Jun. 588.

might be sued upon his personal covenant, contained in the *same* instrument, for the re-payment of the money lent. (*g*) In giving judgment in this case, LAWRENCE, J. observes, "That the object of the act will be very sufficiently answered, if we hold it to make void so much only of the instrument as is meant to convey the property in the ships. The object of the Legislature was, that it should be made appear who were the real owners of British ships, in order to prevent any transfer of them to foreigners, who might navigate them under the privileges of the British flag. That will effectually be done by saying that the transfer shall be void if the requisites be not complied with, without avoiding a collateral covenant for the payment of money contained in the same deed by which the ships were intended to be mortgaged. And this construction is according to the rule of the common law, as laid down by *Hutton*, J., in Ley's Rep. 79. that when a good thing and a void thing are put together in the same grant, the common law makes such a construction that the grant shall be good for that which is good, and void for that which is void." So, likewise, it has been determined that the ship-registry acts do not prevent a person having a lien upon papers deposited with him, belonging to a ship which he is commissioned to sell. (*h*)

Kerrison *v.* Cole, 8 East. 231.

Mestaer *v.* Atkins, 5 Taunt. 381.

Many cases have arisen in questions upon property in ships, as to the operation of the statutes of bankruptcy, where the possession, order, and disposition of the ship, have been left with the vendor, but the vendee has complied with all the requisites of the acts, and become the registered owner. The cases upon this head, which are very important, will be considered in the second part of this treatise. It is manifest, however, from all the cases, that

The registry acts do not affect the statutes of bankruptcy as to reputed ownership.

(*g*) Kerrison *v.* Cole, 8 East. 231.

(*h*) Mestaer *v.* Atkins, 5 Taunt. 381. In this case it is clear that the custody of the papers gave the party detaining them no power over the ship. He could not send her to sea, or sell her, by the possession of the papers *alone*.

The registry acts do not affect the statutes of bankruptcy as to reputed ownership.

where the title of a ship comes strictly and properly in question, no claim can be received in opposition to the modes of conveyance required by the law. The statutes of bankruptcy, particularly the 21 Jac., which are directed against the false appearances of property, and which are meant to punish those who enable the trader to procure for himself a delusive credit by a reputed ownership, (which is to be inferred from his having the order and disposition of goods and chattels by the consent of the true owner) are not at all affected by the registry acts. The registry acts relate only to the formalities of title as between the parties contracting and the public, but they do not interfere with the operation of any other statutes which are enacted to prevent false credit, and which, by assuming the possession, order, and controul of property, as the *indicia* of right, deal with it as belonging to the bankrupt in whose disposition they find it, though the legal ownership and title may, in fact, be in another. In the cases under the act of 21 Jac. there are always two parties; the *real* owner and the *apparent* owner; and the real owner is punished for the fictitious semblance of property which he enables the apparent owner to hold out. This branch of our subject does not fall under our present enquiry.

Robertson *v.* French, 4 East. 130.

There are cases, however, independent of the bankrupt laws, in which the possession of a ship has been deemed sufficient evidence to maintain an action, though the legal title may be in another. Thus, in Robertson *v.* French, (*i*) which was an action on a policy of insurance, the Court of King's Bench determined, that the property of a ship might be proved by parol evidence of the possession of the assured, unless disproved by the production of the written documents of the ship under the register acts: they likewise held, that such parol evidence of ownership, arising from possession at a particular period, was not disproved

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(*i*) 4 East. 130.

by shewing a prior register in the name of another, and a subsequent register to the same person. And in another case, in the Court of Common Pleas, (*k*) it was decided, that where the plaintiff bought and paid for a ship stranded on the English coast, but had no regular conveyance of her, and the defendant possessed himself of parts of the wreck, which drifted on his farm, that the plaintiff's possession enabled him to recover for them in an action of tort. The Court being of opinion, that the possession of a ship under a transfer, void for non-compliance with the register acts, was a sufficient title in trover against a stranger for parts of a ship being wrecked. LAWRENCE, J. in this case observed, "That there was enough of property in the plaintiff to enable him to maintain trover against a wrong-doer; and although it has been urged that the contract is void with respect to the rights of third persons, as well as between the parties, yet, as far as regards the possession, it is good as against all but the vendor himself."

Sutton *v.* Buck, 2 Taunt. 302.

Of the evidence afforded by the registry acts.

It was formerly the practice to produce, at trials at Nisi Prius, the register-book of shipping, from the custom-house, as evidence of the title, both to establish an ownership on the part of the plaintiff, and to charge the defendant, if a ship-owner, with the property in the vessel. This evidence was, for a long time, received without discussion or objection. But in the case of Frazer *v.* Hopkins, (*l*) when this question was brought before the Court of Common Pleas, they held, that the register alone did not furnish even *primâ facie* evidence to *charge* a person as owner of a ship in a suit between private individuals. Such a use of the register was certainly not in the contemplation of the Legislature; and it is perhaps possible, though not likely to occur, that the name of a person may be introduced into the book of registers without his assent. Therefore, in a subsequent case, the Court of King's Bench determined, that proof of the execution of

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(*k*) Sutton *v.* Buck, 2 Taunt. 302.

(*l*) 2 Taunt. 5.

Of the evidence afforded by the registry acts.

a bill of sale of a ship to the defendant was not evidence to charge him, as an owner, with stores furnished to the ship, without shewing his assent to such sale. And they likewise determined, that the register of a ship, naming a person as a part owner, made by, and upon the oaths of others, was not even *primâ facie* evidence to charge him as owner, without his assent or adoption. (*m*) "For notwithstanding," said Lord ELLENBOROUGH, "the practice may have prevailed for a long time, to receive ship's registers as evidence of the property being in the persons therein named; yet, when we are brought to consider the admissibility of such evidence against the defendant, in a case where he has done no act to adopt the register as having been made by his authority, we cannot give effect to it, without saying that a party may have a burthensome charge thrown upon him by the act of a third person, without his own assent or privity. If it had appeared that the defendant, by any act of his own, had recognized the register, he would have been liable to all the consequences as a part-owner, which it describes him to be; but here he has done no act to adopt it. His partner has, indeed, dealt with the property as if the defendant were a part-owner, by registering the ship in his name; but the act of a third person, without some act of the defendant to recognize it, cannot throw upon him a burthen, without violating the plain rule of law."

Tinkler *v.* Walpole, 14 East. 226.

Mr Justice BAYLEY said,—"Before the first register act passed, there must have been other media of proof to charge a party as owner of a ship; and the object of that act was not to create evidence to charge any person named as owner, but that no person should have the benefit of the British navigation without registering his ship in the manner prescribed. It would be very unjust, in many cases, if a person could be charged as a part-owner, with the expences of the ship, by having his name inserted in

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(*m*) Tinkler *v.* Walpole, 14 East. 226.

Of the evidence afforded by the registry acts.

the register, without his knowledge. It would often be converted into an engine of fraud; for if the owners were not in good circumstances, it would be easy to introduce another name of a solvent man into the register, in order to procure credit; and then, if that were evidence against him, he would be liable to be sued;—and how could he be prepared to negative the evidence if he knew nothing of the fact of such a register? The other owners named would be made parties to the action, so that he could not call them to disprove the fact."

Upon the same principle, a register is not of itself evidence of a joint ownership, in support of the defendant's plea, that other persons there named are jointly liable with him; (*n*) nor is it evidence that the ship is British built, as there described. (*o*) So, in an action brought by the plaintiff, as agent, on a policy of insurance, the register is not evidence to prove an averment, that the interest in the ship is in the persons there described. (*p*) The Legislature has made the registration necessary to perfect a title, but this does not make it of itself proof of the title. Property in a ship is to be proved now as it was proved before the acts of Parliament relating to registers; as, for example, by proving actual possession in the party, or in those to whom he has committed it, or in those from whom he has himself derived his title. Any one of these media of proof, (accompanied by the evidence of the registry, in order to make the other evidence admissible,) will be sufficient.

Register and certificate of registry conclusive evidence of want of title against those not named therein.

But the register and certificate of registry are conclusive evidence of want of title against those who are not named in the register. Thus, in an action on a policy of insurance on freight, where the interest in a ship and its earnings were alleged to be in four persons, who were partners in trade, two only of whom

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(*n*) Flower *v.* Young, 3 Campb. 240.

(*o*) Reusse *v.* Meyers, 3 Campb. 475.

(*p*) Pirie *v.* Anderson, 4 Taunt. 652.

Of the evidence afforded by the registry acts.

were named as owners in the register, it was decided that the action could not be maintained, although it was proved as a fact, that the ship had been paid for by the four partners; for, as the plaintiffs claimed the freight only in right of ownership, they could not recover without proving that right; and it appeared conclusively from the register that all the four partners had not a legal title to the ship. (*q*)

Mac Iver *v.* Humble, 16 East. 169.

But where the party sued as a partner for the value of goods furnished for the owners of a ship was neither a partner in fact at the time, (having parted with his share sometime before,) nor held himself out as such, having previously withdrawn his name from the firm at the counting-house, and sent circular letters to the correspondents of the house, notifying the change, the Court of King's Bench held, that he could not be charged, merely because having defectively conveyed his whole share in the ship before that time, he had subsequently joined with the assignees of the bankrupt partners in the ship in making a good title to it to a purchaser from the assignees. (*r*) In the above case, the defendant's name was on the register of the ship, with his own consent, until after the goods, for which the action was brought, were furnished; the court, however, considered it as a question to whom *credit* was given, and held that the evidence of the register was not of itself sufficient to charge him.

In this case it is observed by Mr. Justice BAYLEY, "That the object of the registry acts was to inform the government whether the owners were *British*, and to prevent ships belonging to foreigners from being navigated under the British flag; and the object was not to inform the tradesmen to whom they should give credit. The

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(*q*) Camden *v.* Anderson, 5 T. R. 709. See likewise this case, *ante*, p. 298.

(*r*) Mac Iver *v.* Humble, 16 East. 169.

Of the evidence afforded by the registry acts.

cases of Young *v.* Brander,(*s*) and Frazer *v.* Marsh,(*t*) both shew that a person may be deceived as to the true owner by looking merely at the registers; and that, therefore, before trust is given, it is proper for the tradesman to inquire further."

There is a case, the authority of which seems doubtful, that in trover for a ship, if the plaintiff produce the original register, and attempt, unsuccessfully, to deduce title under it, he cannot afterwards rely upon his possession. On the contrary, it should seem that the plaintiff's possession of the ship would be the very best *primâ facie* evidence of title he could give, and that the ship's register, though necessary to perfect a title, is no evidence *per se* of ownership. (*u*) There is another case, likewise, which seems questionable, in which it is stated, that where a ship is purchased by a British subject from a foreigner, the production of the copy of the register from the custom house, in which the vendee is stated to be the owner, is evidence of property without producing the bill of sale. (*x*) It should seem, from recent decisions, that more evidence would be required; that it would be necessary to prove either the transfer in fact, or some acts of ownership and possession, indicating property. It has been held, however, sufficient to prove the transfer of a ship in France, (where it is usual to lodge the bill of sale with an officer, and to obtain a copy from a notary,) to produce *such* copy in evidence without proof of its having been examined with the original. The reason seems to be this; that the court will give credit to a public instrument delivered out by the proper officer in a foreign country, though there may be an ori-

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(*s*) 8 East. 10.

(*t*) 13 East. 23. These cases will be cited in another Chapter, together with such cases as have occurred between mortgagor and mortgagee, as to the liability for necessaries furnished to a ship; —repairs, seamen's wages, &c.

(*u*) Sheriff *v.* Cadell, 2 Esp. 617.

(*x*) Woodward *v.* Larking, 3 Esp. 287.

Of the evidence afforded by the registry acts.

ginal, of higher authority, capable of production.(*y*) An affidavit of register, made by A. and B., stating that A. B. and C. are the owners, will not be evidence to affect C. Such evidence, as we have above shewn, was formerly deemed sufficient *primâ facie* proof of ownership: (*z*) but the late cases, to which we have adverted, have decided otherwise. But in an action against the owners of a ship it is sufficient *primâ facie* evidence of ownership, to put in an undertaking to appear for them, given before the commencement of the action by the person who subsequently acted as their attorney in defending it, in which he describes them *as owners;* without further proof of agency. (*a*)

Of the general nature of the evidence in an action against ship-owners.

But in actions of this kind, where there is a difficulty in proving the defendants to be owners, it will always be prudent to obtain from the custom-house, by a proper subpœna and notice, the original affidavit upon which the ship's certificate of registry has been granted. The proof of the subscription of the parties to this affidavit will, of course, be the strongest evidence against *them*, upon the principle, that it is their admission upon oath that they are owners. But as there are cases under the registry acts, in which some of the owners are excused from making the affidavit required by the 26 Geo. III. c. 60. s. 10., the fact of *their* ownership must, of course, (as we have above shewn) be proved by other evidence than that of the register; such, for example, as by some act of ownership; by some adoption, or recognition of the register, or some quality or adjunct of possession, as, by contracting for freight, ordering repairs, or necessaries, concurring with other owners in a joint appointment of the officers of the ship, assuming a disposal of the ship or cargo, or having the accounts rendered to them. Any, or all of these

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(*y*) Woodward *v.* Larking, 3 Esp. 287.

(*z*) Ditchburn *v.* Spracklin, 5 Esp. 31; and Stokes *v.* Carne, 2 Camp. 69.

(*a*) Marshall *v.* Cliff, 4 Camp. 133.

acts, constitute a presumptive evidence of ownership, which, of course, may be rebutted by a proof of the contrary, in which the Court and Jury will have to decide upon the probability of opposite statements. It is the practice to produce at the trial the original book of registers from the custom-house; but this is not necessary; for as this book is a public document, an examined copy of an entry therein will be sufficient. With regard to the proof of entries in public books, it is now clearly settled, that wherever an original is of a public nature, and admissible in evidence, an examined copy will equally be admitted. It is not necessary to cite cases to confirm this position, as it stands upon two strong public reasons; the first, the security of the public document, which would, of course, be endangered by frequent carriages backwards and forwards; and, secondly, for the convenience of Courts and public business.

Of the general nature of the evidence in an action against ship-owners.

We have already shewn that if, upon the production of the register, the requisites of the acts have not been complied with, and the omission appear to be with the public officers *solely*, and not with the contracting parties, it is no objection to the vesting of a title in the vendee. Several cases have decided, that where every thing required to be done by the owners, in order to transfer their interest, is regularly performed, the neglect of the Custom-house officers, whether in London or elsewhere, will not avoid the sale, or render them liable as owners to third persons. (*b*)

Sale of a ship not avoided, or title deemed defective, for the omission of the requisites of the registry acts, or mistakes by the public officers.

We have before seen that by the registry acts a trust cannot be raised in favour of persons not named in the register, (*c*) and that a ship purchased by one partner,

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(*b*) Ratchford *v.* Meadows, 3 Esp. 69. Heath *v.* Hubbard, 4 East. 110. Bloxham *v.* Hubbard, 5 East. 507. Underwood *v.* Miller, 1 Taunt. 387. Hubbard *v.* Johnstone, 3 Taunt. 177. Dixon *v.* Ewart, 3 Merivale, 325. Thompson *v.* Leak, 1 Madd. 39; and Thompson *v.* Smith, 1 Madd. 399; and see *ante*, p. 277.

(*c*) Heath *v.* Hubbard, 4 East. 110.

and registered in his name only, shall enure as the separate property of that partner, although the purchase and outfit should be taken from the partnership funds, and the earnings placed to the partnership account.(d) Therefore, whether any one be an owner or part owner must be determined by the evidence of the register, and by nothing else: but these acts do not require that the nature or proportion of the interest of the parties should be stated therein; nor does it concern the public to know in what particular union or division of interests part owners stand related towards each other. The statutes provide for the transfer of property in a ship from one subject to another; but they make no mention of the variation of interest between part owners themselves. Therefore, in a case sent by the Lord Chancellor to the Court of King's Bench, where the names of two partners in trade appeared (amongst others) on the certificate of registry as owners of a ship, that court determined, that the registry acts did not prevent the shewing how, and in what proportions, the several owners were respectively entitled; and, though the partners might derive title under different conveyances, yet, if their shares were purchased with the partnership funds, and treated by them as partnership property, and the partners became bankrupts, these shares were to be considered as joint property.(e) So, likewise, upon the rule that an agent cannot dispute the title of his principal, it has been decided that where a ship originally belonged to one of two partners, and had been conveyed to B. for securing a debt, and B. became the sole registered owner of the ship, and afterwards, as *agent for both partners*, insured the ship and freight, and charged them with the premiums, and, on a loss happening, received the money from the underwriters; the Court of King's Bench held, that he was accountable to the assignees of the surviving partner for the surplus, after payment of his own debt,

The registry acts are not of themselves evidence of, and need not state, the particular proportions in which part owners are interested in a ship.

Ex parte Jones, 4 Maule & Selwyn, 450.

Dixon *v.* Hammond, 2 Barn. & Ald. 310.

(d) Curtis *v.* Perry, 6 Vesey, 739; and ex parte Yallop, 15 Vesey, 60.

(e) Ex parte Jones, 4 Maule and Selwyn, 450.

and not to the executors of the deceased partner, to whom the ship originally belonged. (*f*)

When a new registry may be obtained.

Having shewn that the registry of itself (though necessary to complete a title,) is not evidence of property, unless it can be confirmed by some collateral circumstance, which ascertains that such registry has been made by the authority or adoption of the persons sought to be charged as owners, it merely remains to add, that the statutes of registration have not omitted to provide for accidents and incidents, to which the certificate of registry is peculiarly exposed. Officers, therefore, are permitted to make a registry *de novo*, under the five following circumstances:—1. Where the old certificate has been lost or mislaid. (*g*) 2. Where the certificate is wilfully detained by the master. (*h*) 3. Where, after a transfer of part of the property in the same port, the owners of the part *not transferred* desire a new registry. (*i*) 4. Where the ship is altered in form or burthen. (*k*) 5. Upon any transfer of property to another port. (*l*) It may be necessary here to add, that in order to take away all possible evasion, it is expressly prohibited to change the name of a ship. (*m*)

What vessels, &c. need not be registered.

We shall conclude this chapter by repeating what, in substance at least, we have before stated, that these acts apply to merchant ships only; that is, to vessels traversing the sea, or trafficking upon the sea-coast. Vessels of war, and vessels of whatever built or character, belonging to His Majesty and the Royal Family, are not required to be registered. And lighters, barges, boats, and vessels of *any built or description whatever*, used solely in inland navigation, or in rivers, are not within the compass of these acts. (*n*)

(*f*) 2 Barn. and Ald. 310.

(*g*) 26 Geo. III. c. 60. sect. 22.

(*h*) 28 Geo. III. c. 34. sect. 14. & 34 Geo. III. c. 68. sect. 19.

(*i*) 34 Geo. III. c. 68. sect. 21.

(*k*) 26 Geo. III. c. 60. sect. 24.

(*l*) 7 & 8 Will. III. c. 22. sect. 21.

(*m*) 26 Geo. III. c. 60. sect. 19. 34 Geo. III. c. 68. sect. 22.

(*n*) 26 Geo. III. c. 60. sect. 6.—See likewise Laroche *v.* Wakeman, Peake's N. P. p. 140.

CHAPTER VIII.

OF SEIZURES AND FORFEITURES FOR THE BREACH OF THE NAVIGATION LAWS, REGISTRY ACTS, &c. &c.

THE severe penalties which have been enacted from time to time against persons guilty of violations of the navigation and registry acts have already been brought before the notice of the reader in the detail of the several statutes themselves. It will be seen that the forfeiture of the vessel, and sometimes of the cargo, is the ordinary penalty for a breach of these laws. Unquestionably these penalties are severe; and if they were exacted with a rigorous justice, which did not relax according to the particular circumstances of the alleged case of forfeiture and seizure, they would deserve the character of harshness. The legislature, however, notwithstanding its jealousy and suspicion lest these salutary laws, framed for so many important interests, should be evaded or violated, has introduced an equity and discretion, established by several acts of parliament, to controul their application; thereby accommodating them to those accidents, and sometimes to those mixed cases where an innocent intention is not altogether apparent, which are constantly occurring in a course of extensive trade and commerce. In furtherance of this principle, and with a view to relieve merchants and ship-owners, the Lords of the Treasury and the Commissioners of Customs are empowered by an act of parliament, to which we shall presently advert, to restore ships and goods seized for a violation of these laws; such power to be limited to those cases where there is no proof of fraudulent intention.

Discretionary power vested in the Lords of the Treasury and the Board of Customs in the execution of the registry acts, relating to shipping, trade, and commerce.

The Betty, Cathcart, 1 Rob. 220.

One of the most able decisions in this class of cases of equitable constructions is that by Sir William Scott, in the case of the Betty, Cathcart. It was the case of a British vessel, sailing without a register from circumstances of necessity. That learned Judge decreed her not to be forfeited under the navigation acts. "The revenue and navigation laws," he says, "are certainly to be construed and applied with great exactness: they are framed for the security of great national interests; and the effect of such laws, founded on great purposes of public policy, must not be weakened by a minute tenderness to particular hardships. At the same time, it is not to be said that they are not subject to all considerations of rational equity; cases of unavoidable accident, invincible necessity, or the like, where the party could not act otherwise than he did, or has acted at least, for the best, must be considered in this system of laws, just as in other systems;—laws that would not admit an equitable construction to be applied to the unavoidable misfortunes or necessities of men, or to the exercise of a fair discretion under difficulties, could not be laws framed for human societies. The Court, therefore, will not deem it a departure from the duty of legal interpretation in such cases, to give a fair attention to considerations of this nature. The present case, (adverting to the case before him) is, in its general appearance, of a favourable aspect; it has no symptom of fraud; there is no attempt to impose; this alone, it is true, would not be sufficient; for it certainly may happen, that a *bonâ fide* case may incur the penalty of the law, and may become the victim of a general policy, anxious to prevent the possibilities of fraud, and therefore active in prohibiting modes of dealing which are grossly liable to abuses of that kind, though the particular transaction may not be directly impeachable." (*a*) The ship was directed to be restored.

(*a*) 1 Rob. 240.

27 Geo. III. c. 32.

51 Geo. III. c. 96.

Powers of commissioners of customs to restore seizures, &c.

One of the leading acts, with respect to the vesting of a discretionary power in the commissioners of the customs to restore vessels and goods seized and forfeited for a violation of the revenue laws, was the 27 Geo. III. c. 32. This most equitable and beneficial law, originally confined in its application to revenue seizures, is extended by a subsequent statute,(b) which authorizes the commissioners of customs in England and Scotland, according to their respective jurisdictions, to order any goods whatever, or any vessels, boats, &c. that shall be seized as forfeited, either by any officer of customs, or by any other person whatsoever, *by virtue of any act of Parliament made for the protection of trade, the benefit of commerce, or the encouragement and increasing of shipping and navigation,* or in pursuance of any other act of Parliament in any respect relating to the department of customs, to be restored to the proprietor, whether such goods, &c. shall have been seized as forfeited in Great Britain, or on the high seas, or in any other of His Majesty's dominions, settlements, or plantations. This discretion, however, is not to be exercised except evidence shall be given to the satisfaction of the commissioners, according to their respective jurisdictions, that the forfeiture arose without any design of fraud in the proprietor of such goods. And in case the seizure shall have been made by any officer, in any of His Majesty's settlements or plantations, or on the high seas, it must be made to appear to the satisfaction of the commissioners of customs in England, that the seizure was occasioned by the proprietor of such goods having acted in conformity with the orders or directions which the governor or chief officer of any settlement or plantation may have deemed it expedient, on any particular emergency, to issue.

Terms on which restoration is to be made, 51 Geo. III. c. 96.

But in any case wherein the commissioners shall exercise the powers vested in them, such goods, &c. shall be restored to the proprietor, in such manner, and on such terms and conditions, as, under the circumstances of the case, shall appear to the commissioners to be reasonable, and as they shall think fit to direct; and, if the proprietor shall comply with the terms and conditions prescribed by them, it shall not be lawful for the officer of customs, or any other person who shall have seized such goods, &c. or any other person whatever on his behalf, to proceed in any manner for their condemnation; but, if such proprietor shall not comply with the terms and conditions, such officer or person is to be at liberty to proceed for the condemnation of such goods, &c.; provided always, that if such proprietor shall accept the terms and conditions prescribed by the commissioners of customs, such proprietor shall not have, or be entitled to any recompence or damage on account of the seizure or detention of such goods, &c., or maintain any action whatever for the same.

(b) 51 Geo. III. c. 96. s. 1.

Proprietor complying.

51 Geo. III. c. 96.

Proprietor not complying.

This act was followed by other statutes, framed upon views of the same equity and liberal policy. Thus, the 54 Geo. III. c. 171. makes it lawful for the commissioners of the treasury, by any order made for that purpose, under their hands, to direct any ships or goods whatever, seized as forfeited, by virtue of any act relating to the revenue of customs or excise, or *any act for the regulation of the trade and navigation of this kingdom*, to be restored to the proprietor on the terms which shall be mentioned in any such order. The commissioners are likewise empowered to mitigate or remit any penalty or forfeiture which shall have been incurred under any law relating to His Majesty's revenue of customs or excise, or any act relating to the trade and navigation of this kingdom.

54 Geo. III. c. 171. s. 1. How commissioners of the treasury may restore seizures.

The act, however, with proper precaution, provides that, in any case wherein the commissioners shall exercise the powers vested in them, such goods shall be restored to the proprietors, or such fines, penalties, or forfeitures, remitted or mitigated, in such manner, and upon such terms

Terms to be complied with, sect. 2.

as to costs or otherwise, as, *under the circumstances of the individual case*, shall appear to the commissioners to be reasonable, and as they shall think fit to direct. And no person is to be entitled to the benefit of any such order, unless the terms therein contained shall be complied with.

56 Geo. III. c. 104. s. 7. Reward to informers.

In order, however, that lenity might not relax vigilance, nor too much discourage that inspection and supervision in subordinate officers and agents, by which the interests of the revenue can alone be maintained, and encroachments and frauds repelled and punished, the same act makes it lawful for the lords commissioners of the treasury, or for the commissioners of customs or excise, under their direction, to order so much of the reward, part, or share of any seizure, or of the value thereof, as is by this act given or granted to the officers making any such seizure as they may deem proper, to be paid to the persons by whose information, or through whose means and assistance such seizure may be so made; and that every such reward, or share of any such seizure, or of the value thereof, as shall, under this or any other act be payable to any officers, non-commissioned officers, petty officers, seamen or privates of His Majesty's army, navy, or marines, or acting under the orders of the commissioners of the admiralty of Great Britain and Ireland, shall be divided and distributed in such proportions, and according to such regulations and orders as His Majesty shall, by his order or orders in council, or by his royal proclamation in that behalf, be pleased to direct or appoint. (*c*)

(*c*) By order of the Board of Customs, dated Nov. 29, 1817, in cases of seizure of goods or vessels, when the proprietors are desirous of being acquainted with the cause of such seizure, the collector and controller, and the seizing officers, are not to withhold any proper information, on application being made to either of them by the owner, or any person duly authorized by him. And by order of the Board of Customs, dated June 23rd, 1818, informers are not to have more than the reward of *one third part of the seizing officer's share*, without previous communication with, and special directions from the board.

By whom actions to be brought, sect. 15.

The fourteenth section of this act contains a clause which is meant to restrain vexatious informations and suits for forfeiture. It enacts, that it shall not be lawful for any person whatsoever to commence, prosecute, enter, or file, or cause to be commenced, &c. any action, bill, plaint or information against any person for the recovery of any fine, penalty, or forfeiture, incurred under any act now in force, or which shall hereafter be made, relating to His Majesty's revenue of customs or excise, or to issue, or cause to be issued, any writ of appraisement for the condemnation of any boat or other vessel, or any goods seized as forfeited, by virtue of any such act, unless the same be commenced, &c. by order of the commissioners of customs or excise, or by or in the name of His Majesty's Attorney General; and if any action, &c. is commenced, &c. by or in the name of any person whatsoever, except upon such order, or by or in the name of His Majesty's Attorney General, the same, and all proceedings thereupon had, shall be null and void; and the Court, or justices of the peace, where, or before whom, such action, &c. shall be so commenced, &c., shall not permit any proceeding to be had thereupon. (*d*)

(*d*) A rule had been obtained calling on the collector of customs for the port of Falmouth to shew cause why the writ of appraisement of certain vessels and their cargoes, sued out of this Court by the seizing officer, should not be quashed, and all further proceedings thereon stayed. The application was made on the part of the commissioners of customs, in aid of an order made by them, under the authority of 51 Geo. III. c. 96., for restoration of the subject of seizure, founded on their certificate that the forfeiture had been incurred without fraud on the part of the owners. Cause was shewn on behalf of the seizing officer, and *contrà*—THOMSON, Chief Baron, delivered the judgment of the Court, "This application," he said, "is made to the Court on the part of the commissioners of customs, on the ground of their order, made in pursuance of the powers vested in them by 51 Geo. III. c. 96., which is founded on the twenty-seventh of the same reign, c. 32. The twenty-seventh confines that power to ships seized for breach of the revenue laws. The fifty-first extends it to all seizures made for any cause of forfeiture whatever

In pursuance of this power, so vested in them, the commissioners have made an order, stating that they are satisfied that no fraud was intended on the part of the masters or proprietors of the vessels seized, and that they have therefore ordered a restoration of the goods. For the seizing officer it is contended, that the commissioners have no power under the act to make such an order, without directing compensation to be made to him, and imposing terms on the proprietors for his indemnity and protection. But it appears to the Court, that though, if any terms had been imposed, they must have been complied with, yet that it is not necessarily incumbent on the commissioners to ingraft terms on their order for restoration. It is as a preliminary step to the enforcing of that order, that the present application is made on the part of the Crown. Perhaps we should go too far, to order the writ of appraisement to be quashed, and therefore our order will be, that all further proceedings on the writ of appraisement and indenture of seizure be stayed. Rule absolute. *In the matter of the ship Maria, and other vessels.* 1 Price's Exch. Rep. p. 4.

LAW OF NAVIGATION,

Merchant Shipping,

AND

MARITIME CONTRACTS.

PART II.

OF MERCHANT SHIPPING AND SEAMEN.

CHAPTER I.

OF OWNERS AND PART OWNERS.

IN the former part of this treatise we have been occupied in developing and explaining the general navigation system of the country. We have shewn the origin and policy of this system, as well with respect to our whole trade, as through all its subdivisions and details. We have, we trust, made it manifest, that the same reasons and the same principles, varying only according to circumstances, which occasionally throw them, in practice, into different shapes, are pursued by our navigation laws, both in our home, colonial, foreign, and European trade.

It must be obvious to every one, that it is a matter of indispensable necessity to the English merchant to be instructed in a system in which the law comprehends his interests and duties. Under these circumstances, we have deemed it necessary to enter with some minuteness into the details of the several provisions of the acts of parliament respecting our colonies; and for the sake of better explaining them, to give the reason and principle upon which they proceed. In our chapter on this trade we have been the more particular in this explanation, on account of the importance of the subject, and the complexity of some of the regulations. We have been equally full upon the subject of the trade with Asia, Africa, and America, which involves the charters of some of our great public companies, and more especially, of the East India Company. The slave trade acts, being all of very recent origin, and untouched in any treatise on commercial law, have necessarily occupied an equal portion of our attention, together with the new regulations of the American navigation laws. In the chapter on the European trade, we have been necessarily led into a review of the late treaties of commerce: but have dispatched them with as much brevity as was consistent with clearness and utility; insisting upon nothing but what is necessary to the practical merchant, and what may operate in cases brought before our own courts of law. A cursory review of the late extensive system of licences was likewise necessary, being, as it were, the law merchant of war, and having been administered and explained in the most complicate and difficult cases by a Judge so enlightened as Sir William Scott. As respects the fisheries, we have likewise been obliged to examine the several acts which regulate them in much detail. This trade, indeed, within the last few years, has been nearly wholly recast, and there is still a prevalent disposition to get rid entirely of the system of bounties. It is, therefore, of the first consequence to merchants, not only to understand the present regulations, but to be enabled to maintain and defend their own interests, by urging the reasons of the ancient policy. In the chapter on the registry acts, the most important branch of our navigation law, and in which it is to be lamented, that much complexity still exists, (rendering transfers difficult, and property in ships, in some cases, uncertain,) we have deemed it our duty to examine all the decisions in full, and to deduce such principles from them as may be safely applied. in practice, to analogous cases. We now proceed to the second part of our subject, the law of merchant ships, and seamen; and we shall commence with explaining the rights and duties of owners and part owners.

Of property in ships; and how acquired.

The property of ships is acquired, as that of other chattels, either by being the fabricator of the thing, or by purchasing it of another; and ships, being personal chattels, devolve as assets to the representatives of the owners, his executors, or administrators. There is, however, this main difference in ships as distinguishable from other personal chattels, namely, that not being subjects of market overt, and being moreover property of great value, and always moving from place to place, the law will not vest the property in the buyer, unless it shall appear that the seller had authority to sell. Hence property in ships, like real property, has in almost all times, and more particularly at present, been transferred by written documents, in which the seller exhibits his power to sell, and by which the buyer may ascertain the safety of his purchase. Previous to the 34 Geo. III. c. 68., it was matter of doubt whether a ship might not be transferred from hand to hand, like other property, notwithstanding the previous act of the 26th of the King. But this act requires all transfers of ships to be by bill of sale or other instrument in writing (*a*) This provision is partly on account of the great value of this species of property, and the frequent occasions on which it is absent at very remote places from the supervision of the owner; and, in part, as an additional security to the objects of the registry acts,

Transfer of ships to be in writing.

(*a*) Sect. 14. and see *ante*, p. 249.

These written documents thus constitute a kind of title, by means of which the transfer of vessels is greatly facilitated, and in most cases are the only means by which such transfer can be made. When any ship is to be sold, she is, of course, either absent upon the seas, or in her home port. If absent upon the seas, there are necessarily no means of transfer but by assignment of the grand bill of sale; and such bill of sale, together with the delivery of any other documents which may relate to the ship, is a perfect transfer of the property at common law(*b*) It is true, indeed, that upon the return of the vessel to her home port, the buyer should confirm his purchase by actual possession; but this seems to follow more of course, and as matter of prudential caution against claims under reputed ownership in bankruptcy, than to be essential in point of law.

Possession necessary as a prudential precaution, though not actually required by law.

It is the same with respect to the purchase of a vessel in her home port. It is always usual, and, indeed, matter of prudence, for the purchaser to take actual possession of the ship: but it seems necessary as an act of caution rather than as a requisite of law. For the title to personal chattels by the common law vests in the owner all possessory rights, and he is entitled to maintain actions of trespass or trover without a manual possession of the chattel itself. If a part only of a vessel be sold, it is manifestly impossible that such actual delivery should be made; and, in any case, where such possession is necessary, the possession of the other part owners will enure to the benefit of a purchaser of a part. The necessity of completing the title to a vessel purchased at sea, by taking actual possession of her upon her arrival, is strongly enforced by the case of Mair *v.* Glennie. The plaintiffs were assignees of T. Mair, a bankrupt; the defendants were assignees of Sharp and Co. T. Mair, the bankrupt, had transferred

Mair *v.* Glennie, 4 Maule and Selwyn, 240.

(*b*) For the forms which the registry acts require, and the mode of complying with them, see *ante*, p. 248. and Chap. VII. *passim*.

a ship and cargo, at sea, to Sharp and Co., the other bankrupts, as a security for money borrowed; but, upon the arrival of the vessel in her home port, Sharp and Co. neglected to take possession, or to do any act to notify the transfer of the property to them. Upon these circumstances the Court of King's Bench determined that the property should pass to the assignees of Mair, as being in the possession, order, and disposition of Mair, at the time when he became a bankrupt. It was likewise a collateral determination in this case, that an agreement between Mair and the captain, that the captain should have one-fifth share of the profit or loss on the voyage of the ship and cargo, did not prevent Sharp and Co. from taking possession, it not being such a part ownership as to amount to a constructive possession for himself and others.

Robinson *v.* Macdonell, Selw. 1142.

The case of Robinson *v.* Macdonell shews likewise the danger of deferring the actual possession of a vessel purchased whilst at sea by bill of sale. This case principally proceeded upon the authority of Mair *v.* Glennie. It was an action of trover for a ship: B. being the registered owner, executed a bill of sale of the ship to S., as a security for advances, which had been made by S. to B. At the time of the execution of the bill of sale the ship was at sea; she returned the latter end of the year 1811. S. did not take possession; but, in May, 1812, the ship was registered in the name of S. Notwithstanding this alteration, the ship continued under the controul of B., who ordered her out for the whale fishery, appointed the captain, and exercised all the ordinary acts of ownership. S. became a bankrupt; the ship returned; and shortly after B. became a bankrupt. The question was, whether B. was the ostensible owner, under the statute 21 Jac. 1. c. 19. so as to give his assignees a claim to the ship. The court were of opinion that B. *was* the ostensible owner; and Lord ELLENBOROUGH, in delivering the judgment of the court, said, "The register acts were passed for purposes of public policy, and the means adopted for effecting that object are such, that every person claiming title through the medium of a conveyance, *as the act of parties*, must shew a conveyance of the form and character prescribed by those statutes. The plaintiffs did shew an original title in the bankrupt, whom they represented, grounded upon such conveyances. Has that title been divested, as against them (they being the representatives also of the general body of creditors,) by any other conveyance? It is admitted that deeds alone, in the case of an unregistered ship, would not have that effect, and we think the registration and new certificate cannot produce it. These statutes do not affect titles passing by operation of law, as to executors or administrators in case of death; or to assignees generally in case of bankruptcy. In these cases a title may be transmitted without any of the forms required by the statutes; and if a title may be transmitted without these forms in cases of bankruptcy generally, we see no reason why it may not be so done in a particular case, falling within the scope and operation of the statute of James, though these forms have been complied with in a conveyance to others, *i. e.* the Sharps; such conveyance being fraught with all the mischief that statute was meant to prevent. The register acts make certain forms necessary to the validity of transfers and conveyances, which antecedently would have been good and valid without them: but it was never intended by the legislature that a compliance with these forms should give validity to a transfer and conveyance which antecedently would have been bad and invalid, and we think such an effect ought not to be attributed to them."(*c*)

Hay *v.* Fairburn, 2 Barn. and Ald. 193.

A point nearly similar was again brought before the court in Hay and others, assignees of Matthews, against Fairburn.(*d*) Matthews, the bankrupt, the registered owner of the ship Dolphin, assigned her, then being at

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(*c*) 2 Barn. and Ald. p. 196, where this judgment is cited.

(*d*) 2 Barn. and Ald. p. 193.

sea, as a security for his debt to the defendant Fairburn. The deed contained a covenant by Fairburn to reassign upon payment of the debt, and the more important condition, *that*, until the sale of the ship, *Matthews was to be permitted* to *have*, hold, and *enjoy the same, and to receive the ship's earnings* for his own benefit. All the requisites of the registry acts were complied with so as to vest the legal interest in Fairburn. At the time of the execution of the assignment Matthews had possession of the vessel, and continued in possession, and in the apparent exercise of ownership, until his bankruptcy. The defendant never interfered in any way with the conduct or management until the 1st of June, 1816, when he took possession, displaced the master, and appointed one under himself. The commission against Matthews issued on the 11th of May, 1816, under which he was duly declared a bankrupt. Fairburn's demand upon the ship had been reduced by payments to about 595*l.*; he sold the ship, and the proceeds remained in his hands. The question for the opinion of the Court of King's Bench was, whether the bankrupt was not to be considered the ostensible owner under the 21 Jac. 1. c. 19. The court gave judgment for the plaintiffs, on the authority of the case of Robinson *v.* Macdonnell; but, on account of its importance, they permitted it to be turned into a special verdict.

These two cases illustrate, very strongly, the expediency, not to say the prudential necessity, of confirming a purchase of ships by an actual possession as soon as possible; not, as we have above said, that such possession is necessary to complete a title in law, but as a caution to remove such contracts from the operation of the bankrupt acts, and from the presumptions of courts upon cases where an execution may issue against an apparent owner.

With respect, therefore, to the alienation of a ship, it may be summarily observed, that there may be two conditions of the ship, and two of the seller. The ship may

How the whole or part purchaser should complete his purchase by an actual possession.

be absent, or in her port; the seller may be owner in whole or part. If the ship be absent, whether the seller be a whole or part owner, the transfer can only be by bill of sale or instrument in writing, and a compliance with the other forms of the registry acts, (*e*) but to be followed up (if the purchase be of the whole ship,) as previously observed, by actual possession on the ship's arrival in her port. If the purchase be of part only, the vendee, in order to prevent the operation of the statute of 1 Jac. 1. ought to exercise some act of part ownership, or, at least, to make some public declaration to the joint owners, captain, crew, or others concerned in the vessel. This is material, and should not be overlooked by purchasers in the circumstance of part ownership. But if the vessel be in her port at the time of the sale, the contract should be followed by an immediate actual possession in one of the ways above-mentioned; namely, if of the whole vessel, by the purchaser's going on board and taking possession, or employing an agent for that purpose; if of part of the vessel, by some act or declaration of part ownership as above-mentioned. It seems necessary to add, that from the large and equitable interpretation given to the bankrupt laws, no other mode of contract for shipping can be regarded as entirely safe.

Of property in ships taken as prize.

The two most usual ways of acquiring property in ships are, by building the vessel, or purchasing it from another. A third mode is by capture from an enemy in time of war, the captor having a legal title to make the prize, and the vessel being afterwards condemned in a suitable court. Such capture must necessarily be made by a King's ship, a private vessel having letters of marque, or a merchant vessel fighting in its own defence. But in almost all these cases, the capture, in practice, almost immediately resolves itself into a sale; the prize being taken into a suitable port, upon condemnation sold, and the proceeds divided

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[(*e*) See *ante* p. 248, and Chap. on the registry acts, *passim*.

amongst the captors. This immediate sale is so much indeed the natural course, that the acts of parliament, by which prizes are permitted to be registered as British ships, always presume their sale. The purchasers of captured vessels, therefore, may apply for their register in the same manner as if such vessels were British built; except that, in order to prevent frauds, they must produce to the proper officer of the customs a certificate of condemnation under the hand and seal of the judge of the court in which the ship has been condemned, together with an oath of the vessel's identity. (*f*)

Of property in ships acquired by a purchase from pirates.

As pirates are robbers, and as a sale by them is, of course, only a sale by robbers, a third party, though a *bonâ fide* purchaser, cannot claim against an owner upon the allegation of a capture by such pirates, and a sale to himself. Such a taking is not a capture, but a robbery, and does not divest the property of the owner. But an eminent distinction must be taken here with respect to captures made by Algerines, Tunisians, and other of the Barbary States. Such states, at least before the last treaty, were considered to be in perpetual hostility with Christian communities, and captures made by them were deemed to be captures by an enemy. No case has arisen since the treaty made after the late expedition by Lord Exmouth: As respects the Algerines and their dependencies, the only African power comprehended in the treaty, a doubt might reasonably arise in a court whether captures made subsequent to this treaty were to be deemed as acts of piracy, or as captures made by an enemy. But this question can only arise with respect to the vessels of Algiers and Tunis. But before this treaty, all captures by these powers were deemed sufficient to give a title to a third party being a *bonâ fide* purchaser. In the Helena, Heslop, (*g*) it was decided by Sir William Scott, that the capture and sale of an English ship, by a vessel belonging to the Dey of

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(*f*) See *ante*, p. 256.

(*g*) 4 Rob. 3.

Algiers, was not such a piratical seizure as to affect the the conversion.

Of property in ships sold under a sentence of condemnation in the Admiralty Courts.

But in all cases of legal capture a sentence of condemnation is necessary to complete the title of the purchaser; and he should accordingly not neglect to demand it as one of the muniments of the ship. In the Flad Oyen,(*h*) the Kierlighett,(*i*) and the Prosperous,(*k*) the vessels, after capture, were restored by the Court of Admiralty to their original owners upon two principles: 1. That such sentence of condemnation was necessary to complete a legal alienation of the ship; and, 2. That in the case of those vessels, such sentence had been pronounced by an insufficient jurisdiction; namely, by a consul or minister of a belligerent power in the country of a neutral state. Indeed, the courts of this country are so careful not to infringe upon the rights of neutral nations, that in the Herstelder(*l*) a decree, which had been passed upon a vessel, described as lying at Plymouth, was rescinded, on its appearing that she was in fact in a port of Norway at the time of adjudication: the court refusing to condemn a vessel lying in a neutral port.

The Flad Oyen.

Under these decisions, two important points seem fully established with respect to the property in ships acquired by capture, and purchases under them. The first, that condemnation is always necessary; and, secondly, that such condemnation must be by a sufficient court. In the case of the Flad Oyen, (*m*) above cited, Sir William Scott gave a decision so strongly illustrative of this mode of Admiralty law, and of the reasons upon which it rests, that, with some condensation, we shall here cite it. He observed, that it has been deemed peculiar to the law of England to require a sentence of condemnation, as necessary to transfer the property of prize, whilst with other

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(*h*) 1 Rob. 135.

(*i*) 3 Rob. 96.

(*k*) Abbott. 15.

(*l*) 1 Rob. 119.

(*m*) See *supra*.

Of property in ships sold under a sentence of condemnation in the Admiralty Courts.

nations, the simple act of keeping possession of such prize for twenty-four hours, and bringing her *infra præsidia*, was a sufficient conversion. But this notion is not correct, the more general practice amongst European nations being, to require a sentence of condemnation; and in the cases of sale by the captors to deliver over such sentence of condemnation as one of the titles of the ship. And this is the law of England: but it is not sufficient that there should be a sentence of condemnation; it must likewise be by a sufficient jurisdiction. It is entirely contrary to the usage and practice of nations, that such sentence should proceed from a tribunal not existing in the belligerent country. A court of such jurisdiction can only exist within some part of the belligerent country itself.

The Slyboom.

In the Christopher Slyboom (*n*) it was decided by the same Judge, that a sentence of condemnation, passed in the country of the enemy upon a British prize ship, lying in the port of an ally of the enemy, was valid. This is manifest; such ally being, of course, a member of the belligerent power. And where vessels have been legally condemned, that is to say, condemned by a sufficient tribunal, and transferred to neutral purchasers, the legality of such conveyance, whether as respects vessels formerly enemy's property, or of our own country, cannot be disputed here. In the Nostra Signora de los Angelos, (*o*) the circumstances were of great nicety, the point of a previous insufficient condemnation being implicated in the question of a second seizure by the King. This vessel had been taken by a French privateer, carried into a Spanish port, and sold to a Spaniard, prior to the war between England and Spain. Being seized in the port of London on the breaking out of Spanish hostilities, and proceedings commenced in the Instance court on the part of the former owner against the ship, as not having been legally converted by a condemnation to the French captor, she was

The Nostra Signora.

(*n*) 2 Rob. 209. (*o*) 3 Rob. 287.

Of property in ships sold under a sentence of condemnation in the Admiralty Courts.

decreed to be restored to the former owner; the Crown, standing in the place of the Spanish purchaser, not being able to shew that any legal sentence of condemnation and sale had taken place. But, though the Admiralty Courts have always maintained the principle that a ship, lying in a neutral port, shall not be condemned by any agent or jurisdiction whatever acting in such neutral port or country, and have generally extended the rule so far as not even to admit the condemnation of a prize in a neutral port by the nearest tribunal in a belligerent country, it was nevertheless decided by Sir William Scott, in the Henrick and Maria, (*p*) that there might exist a state of circumstances under which a condemnation in the court of the enemy of a prize ship, lying in a neutral port, might be sufficient to warrant a sale to a neutral merchant, on the principles of reciprocity, arising out of the modern practice of our own prize courts, which exercise a power of adjudication over vessels of the enemy carried into foreign neutral ports. Sir William Scott, in this case, said, that the court was bound, against the *true principle*, by the practice which it has not only admitted, but applied; for that in the conduct of war you must hold that to be lawful to your enemy which you practise yourself. But that the true and better principles was, that the belligerent should have, at the time, a safe and certain possession of the prize, and, therefore, that it should not be condemned whilst lying in a neutral port. (*q*) In conformity with the principle of these decisions in the Admiralty, the courts of common law have almost invariably regulated their practice, holding that if the prize courts condemn captured vessels, the sentence, whilst unappealed from, is conclusive in the common law courts, and to all the world. (*r*) The common law courts, indeed, cannot entertain jurisdiction of the question whether prize or no prize,

Henrick and Maria.

(*p*) 4 Rob. 43.

(*q*) See likewise 5 Rob. 285; the Comet.

(*r*) Duckworth *v.* Tucker, 2 Taunt. 7; and Park on Insurance, 490.

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Of property in ships sold under a sentence of condemnation in the Admiralty Court.

or by whom taken. So, likewise, if it can be discerned on the face of the sentence of a foreign court of prize, that such court has condemned a ship on any sufficient ground, the sentence is conclusive evidence in the courts here of the *facts* of such ground of condemnation.(*s*) But the same distinction is to be taken in this case, as in the case of our own superior courts reviewing the judgments of subordinate tribunals. Such superior courts will not enter again into facts already decided by a sufficient jurisdiction. But if it appear upon the very face of the case, that such judgment has been manifestly given, either against the evidence of such facts, or to a greater extent than is warranted by the facts; if there be a manifest error of judgment, or excess of jurisdiction; in all such cases our own courts will wholly disregard the decision of the foreign tribunal. It will only not re-try the same facts.(*t*) But in all these cases the mere production of the foreign sentence of condemnation is a *primâ facie* and presumptive evidence that its judgment is just, and therein conclusive upon our own courts. But in the case of Bernardi *v.* Motteux,(*u*) where there was some ambiguity in the sentence, so that the precise ground of the determination could not be collected, the Court of King's Bench considered themselves at liberty to examine whether the ground on which the sentence proceeded, but which was not stated, actually falsified the warranty contained in the policy of insurance which was then before the court, and on which an action was brought. Hence, it follows, that it does not lie on the party, who produces the sentence, to shew that it has proceeded on the ground of enemy's property; but it is incumbent on the party who objects to the sentence, to

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(*s*) Bolton *v.* Gladstone, 2 Taunt. 85.

(*t*) Pollard *v.* Bell, 8 T. R. 444. Baring *v.* Claggett, 3 B. and P. 215. Oddy *v.* Bovil, 2 East. 473. Havelock *v.* Rockwood, 8 T. R. 268.

(*u*) 2 Dougl. 574. 3 B. and P. 215.; and Phillips on Evidence, 269.

make out that it has proceeded on some other ground. But where the sentence professes to be made *on particular grounds*, which are set forth in the sentence, but which manifestly appear not to warrant the condemnation, the sentence will not be conclusive as to such facts.(*u*)

So much property has been derived to British merchants from captures; and, (though happily the country is at present enjoying a state of peace,) so many causes of future war are inherent in the very greatness of our empire and its commerce, that the commercial law of war is scarcely of less importance to the merchant than the system of the same law during a period of peace. Capture being one of the legitimate modes of acquiring property in merchant ships, it was manifestly expedient to detail and examine the leading cases upon this head.

Of the title to ships by mortgage, and the rights and liabilities of the mortgagee.

Three modes of title to this species of property have been above examined, namely, building, purchase, and capture: a compliance with the forms of the registry acts in all of them is presumed, without which no title can exist to British ships: there remains a fourth, no less frequent, and equally important with the above, viz. title by mortgage. We have shewn, in the seventh chapter, that British ships may be mortgaged, and in what manner.(*x*) It only remains to shew to what liabilities the qualified ownership of a mortgagee, not in possession, subjects him, as respects repairs, stores, seamen's wages, and other appointments of the vessel. As the law of this relation, and all the decisions upon it, depend upon the manifest circumstances of such a state of ownership, it is necessary to remember, that such mortgagee, not being in possession, is in the precise relation of a mortgagee in real property of houses and lands; and, of course, like such mortgagee, cannot upon the general principle be bound by contracts to which he has given no consent, and to which he has

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(*u*) Calvert *v*. Bovil, 7 T. R. 523.

(*x*) See *ante*, chap. 7. p. 306, and following pages.

been no party. The obligation will, of course, follow the party to whom the credit is given, and with whom is the privity of contract. In this, as in other cases, the registry acts do not alter the *nature* of the title of the mortgagee; he is still only an owner not in possession; the registry acts merely evidence his actual relation to the ship for their own objects of national policy. The credit given by a tradesman in any of the requisites of the vessel, stores, repairs, sailors' wages, &c. attaches no obligation upon the mortgagee *merely as such*. He derives no profit until the ship comes into his possession; and is, therefore, no partner. The ship is merely his security, and no more. In Westerdell *v.* Dale, (*y*) Lord Kenyon made it a matter of doubt whether a mortgagee of a ship, though not in possession, was not liable to repairs. His Lordship considered him, whether in or out of possession, as the *legal* owner by virtue of the register acts, notwithstanding his title was subject to equitable interests. The decision of that case, however, turned upon another point. But, in Jackson *v.* Vernon, (*z*) where the case of a mortgagee came immediately before the court, it was decided that such mortgagee was not liable for necessaries provided for the ship before he took possession. This case was so much the stronger, as the mortgagee approached very near to the character of an absolute owner. The owner of the vessel had executed an absolute bill of sale to Jackson, and by another deed of the same date assigned other property to him, which deed of assignment (reciting that the bill of sale was for the better *securing a sum of money*, lent by Jackson, and also reciting a bond and warrant of attorney *to secure the same sum*,) declared that those several deeds and instruments were made to enable Jackson, by sale of *all the things* comprised in them, to raise the sum lent, without his concurrence, *at any time* before the money should be paid off. But in this deed there was a covenant

Westerdell *v.* Dale.

Jackson *v.* Vernon.

(*y*) 7 T. R. 306.

(*z*) 1 Hen. Black. 114.; and see Chinery *v.* Blackburne, 1 Hen. Black. 117. *in notis*; and Frazer *v.* Marsh, 13 East. 238.

that, upon re-payment of the money, Jackson should *reconvey* to him, but so as not to prevent Jackson from *selling, &c. at any time before the full payment, &c.* Under these conveyances, the Court of Common Pleas decided, that Jackson was not absolute owner of the ship, but only mortgagee, and, therefore, *not liable for necessaries provided for the ship before he took possession.* So, likewise, in Twentyman *v.* Hart,(*a*) Lord Ellenborough expressly decided, that the mere mortgagee of a ship, who had not taken possession, was not liable for necessaries supplied for the use of the ship, previous to a retransfer. The repairs, in this case, were ordered by the captain, without the privity or knowledge of the mortgagee.

The title of a ship may furnish evidence that repairs are made, or stores furnished, under the authority, and for the benefit of the legal owner; as in fact they generally are, but it does no more; and, therefore, if it appear that they were made or furnished under the authority and for the benefit of another, the legal owner will not be answerable.(*b*) Thus, where the legal title to a ship remained for a month after the sale in the vendors on the face of the register, by reason of the vendee having omitted for so long a time to deliver a copy of the indorsement of the transfer on the original certificate of registry to the proper officer, authorized to make registry, &c., pursuant to the statute 34 Geo. III. c. 68. sect. 15.; yet the vendors were held not liable, during that interval, for repairs, ordered by the captain, under the direction of the vendee (whom the court, for this purpose, considered as a stranger to the legal owners,) and, consequently, having no authority, express or implied, to bind them.(*c*) And in another case which occurred not long afterwards,(*d*) where the sole registered owner of a ship gave orders for

Young *v.* Brander.

Trewbella *v.* Rowe.

(*a*) 1 Stark. 366.

(*b*) Abbott, 21.

(*c*) Young *v.* Brander, 8 East. 10.

(*d*) Trewhella *v.* Rowe, 11 East. 435.

materials to be furnished, and work to be done for the repairs of it; but, before all the articles were delivered on board, he conveyed the vessel with all its furniture to another by a bill of sale, which was duly registered: the Court of King's Bench determined, that the vendee was not liable for any of the goods furnished before the legal title was conveyed to him, and registered in the manner prescribed by the registry acts; nor was the vendee even liable for any of the goods delivered on board, after the sale to him, by virtue of the previous orders of the vendor, to whom the credit was personally given; but the vendee was held liable for articles which were ordered by the captain for the use of the vessel after the legal title was transferred to him, and upon the *defendant's credit.*(*d*) So, likewise, in the case of Mac Iver *v.* Humble, before cited, (*e*) though the defendant's name was on the certificate of registry after the goods were furnished, and the legal title so far continued in him jointly with others, the Court of King's Bench held him not to be liable for goods furnished to the ship on that account, the credit, in fact, not having been given to him. And in a late case at Nisi Prius, Lord Chief Justice Abbott ruled, that the mortgagees of a ship, who were the registered owners, were not liable to a claim for wages made by a sailor, though they accrued upon a voyage which was so far prosecuted for the benefit of the mortgagees, that the ship's freight and earnings, during such voyage, were made over to them by the same deed which conveyed the ship as a security for advances. In this case the plaintiff had signed articles, in the usual way, with the captain (who was the mortgagor,) for the voyage in question,

Mac Iver *v.* Humble.

Martin *v.* Paxton, *MS.*

(*d*) The marginal note in this case is an imperfect abridgment of the decision. The plaintiff recovered a verdict only for the stores supplied upon the *defendant's credit* by the captain's order. The verdict did not proceed upon the ground that the defendant was liable on account of the legal title of the vessel having been transferred to him.

(*e*) 16 East. 169; and see *ante*, page 324, and Tinkler *v.* Walpole, 14 East. 226.

about a month before the mortgage to the defendants; but it appeared that the ship had not left the river Thames before the mortgage, when she sailed for South America, where she was sold to the inhabitants of that country, and the proceeds of the sale remitted, upon a general account, to the defendants' house. The plaintiff brought his action for wages; and contended, that as the freight and earnings of the ship were conveyed as well as the vessel herself, and as the defendants were the registered owners during almost all the time of his service, he was entitled to recover either the whole of his wages, or *pro tanto;* that his services were beneficially rendered to the defendants, if not under an actual agreement; and that, as the defendants received the proceeds of the sale of the ship, and had likewise stipulated for the freight and earnings, they could not discharge themselves from the obligation to pay the seamen their wages. But the Lord Chief Justice ruled, that the case was to be determined upon the privity of contract; that the plaintiff had made the contract, on which he sued, with the mortgagor, and had given credit to him; he, therefore, and not the mortgagees, were liable. That the registered owners, indeed, were *primâ facie* liable, but that they might shew that the credit was not given to them, and that they had no participation in the contract; that, to hold a mortgagee liable in such a case, would be to put an end to the mortgages of ships. In this case the defendants had never taken possession.(*g*)

How far an owner continues liable, when he charters his vessel to another.

As vessels are often chartered and laden, either wholly or in part, with goods belonging to different persons, in such cases the registered owner is not responsible to such persons, but the charterer is to be considered as owner of the ship with respect to them. It must be confessed, however, that some ambiguity arises from the cases on

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(*g*) Martin *v.* Paxton and others, 1819. Sittings at Guildhall, N. P. E. T.

this subject. In Parish *v.* Crawford, before Lord Chief Justice Lee, (*h*) where the defendant, the owner of a ship, had chartered her to one Fletcher for a voyage for a specific sum; but the freight of passengers was reserved to the defendant, who likewise appointed the master, and covenanted with Fletcher for the condition of the ship, and the behaviour of the master; he was, notwithstanding, held liable to the owner of goods, taken on board by the charterer, who received the freight, but did not deliver the goods. In a subsequent case (*i*) the decision of Lord Kenyon was different. It was an action brought against the defendants, as owners of the Sea Flower, for a loss of some goods on a voyage from Faro to London. One Thomas, the master of the ship, had in his own name as master, and in the absence of the owners, chartered the ship to Reed and Parkinson, on her voyage from Falmouth to Faro, and back to London; and Reed and Parkinson engaged by the charter-party to provide a full lading from Faro, and to pay a stipulated price per ton. The goods were shipped at Faro, by the consent of the agent of Reed and Parkinson at that place; and Thomas, the master, signed a bill of lading, engaging to deliver them to the plaintiff, he paying freight *per* charter-party. These facts appearing at the trial of the cause before Lord Kenyon, his Lordship was of opinion, that Reed and Parkinson were, with respect to the plaintiff, owners of the ship pro *hâc vice;* that the defendants, Jones and others, were not responsible to him; and, consequently, that the plaintiff could not maintain his action. So, likewise, in the case of Mackenzie *v.* Rowe and others. (*k*) This was an action for the non-delivery of fifty casks of oats, shipped on board the Trafalgar, to be carried from London to Surinam. The facts relied upon by the plaintiff were, that the defendants were registered owners of the ship in question; that the oats had been

Parish *v.* Crawford.

James *v.* Jones.

Mackenzie *v.* Rowe.

(*h*) 2 Str. 1251; more fully reported in Abbott, 22.

(*i*) James *v.* Jones and others, 3 Esp. 27. and Abbott, 24.

(*k*) 2 Camp. 482.

How far an owner continues, liable when he charters his vessel to another.

put on board in the port of London, for the purpose of being carried to Surinam, to which place she was then bound; and that afterwards, the ship not being able to make Demarara, the captain improperly sold the oats. There was, however, no evidence that the oats had been received on board the ship by any person *appointed by* the defendants; and it was proved that they had chartered her for this voyage to Surinam to a person of the name of De Beur, who had put her up as a general ship. Lord Ellenborough held, that the registered owners of the ship were not, under these circumstances, liable for the non-delivery of the oats, and directed a nonsuit. The same principle was adopted by the Court of King's Bench in the subsequent case of Frazer *v.* Marsh. (*l*) The case was this:—The defendant became the purchaser of a ship under a sale by the sheriff, in October, 1805; and an assignment of it to the defendant was prepared in the same month, but the sheriff would not execute it till the whole of the purchase money was paid, which was not till 1810. The defendant, however, was put into possession of the ship immediately after the sale, and got her registered in his own name. Afterwards, by a charter-party, he let the ship for a *given number of voyages, and at a certain rent,* to one Walker, who was then the captain, and who afterwards ordered stores for the use of the ship, which were supplied by the plaintiff. For the value of these stores this action was brought against the defendant, as registered owner. But Lord Ellenborough, C. J., before whom the cause was tried, at Guildhall, nonsuited the plaintiff; being of opinion, that during the existence of the lease the relation of master and owner ceased to subsist between Walker and the defendant, and that the stores must be taken to be ordered on Walker's own account. The plaintiff's counsel applied to set aside the nonsuit: but the whole court concurred in the decision of the learned Judge at nisi prius. "The register acts (said Lord ELLENBOROUGH,) were passed *diverso intuitu;* but to say

Frazer *v.* Marsh.

(*l*) Frazer *v.* Marsh, 13 East. 238,

that the registered owner, who divests himself, by the charter-party, of all controul and possession of the vessel for the time being, in favour of another, who has all the use and benefit of it, is still liable for stores furnished to the vessel by the order of the captain during the time, would be pushing the effect of those acts much too far. The question is, whether the captain in this instance, who ordered the stores, were or were not the servant of the defendant, who is sued as owner. And as they did not stand at the time in the relation of owner and master to each other, the captain was not the defendant's servant; and, therefore, the latter is not liable for his act."

How far an owner continues liable when he charters his vessel to another.

Part owners.

We now come to the consideration of part ownership, a relation of shipping which brings it, though a personal chattel, a good deal within the analogy of joint tenancy, and tenancy in common in real property. It will be immediately seen, indeed, notwithstanding an authority hereafter to be mentioned, that part owners of a vessel are not joint tenants, but, in all cases, tenants in common. The distinction of these two modes of tenure is substantially in the circumstance, that joint tenants have not only an unity of title, but an unity of interest, an unity of *time*, and unity of possession; they have a concurrent right to the whole; they have the same right in the smallest particle or division of the whole as in the whole itself; that is to say, joint tenants have nothing several and distinct. But tenants in common, on the other hand, have a right to some certain and distinct portion; only that such part is not yet marked out and ascertained, but all occupy promiscuously. This latter is always the relationship of part owners in a ship. Each has a proportion of the vessel according to his *quota* of the capital concerned, or of the whole purchase. But from the nature of the thing such portion cannot be marked out in *re;* and, therefore, like the profit of the owners of a water mill, of a fishery, &c. must *be* assigned in the proportion of the ship's earnings.

Not joint tenants, but tenants in common.

Part owners.

We have said that part owners in ships are not joint tenants, but tenants in common, a distinction from which many important properties arise. In the first place, there is no *jus accrescendi*, or right of survivorship, a quality, which being appended to a possession *per my et per tout*, at common law, always accompanies joint tenancy. In the second place, part owners have no specific lien upon the common property in respect to advances and balances. In Doddington *v.* Hallett,(*m*) an early case decided by Lord Hardwicke, it was holden that part owners of a ship *had* a specific lien on the shares of each other for the balances due to them. The case was this:—It appeared that the plaintiffs had covenanted with one T. Hall, who died intestate, to take certain shares subscribed for by them, and which amounted together to *eleven sixteenths* of a ship, to be built and fitted out under his directions, for the service of the East India Company; that the ship was accordingly built and equipped, and was then at sea, and the builder had executed a general bill of sale of the whole to him, and he had not executed any bill of sale to them for their respective shares. The defendant, by his answer, admitted that he was a trustee for the plaintiff as to the *eleven sixteenths*, but submitted that they were not liable to the tradesmen, because the debts were contracted by the intestate; and further insisted, that they had no specific lien on the shares, which not being subscribed for, belonged to him. The Lord Chancellor decreed a reference to the master to take the accounts, and directed allowance to be made to the plaintiffs for all such sums as they had paid, or were liable to pay to the tradesmen or workmen for building, equipping, or victualling the ship, or for seamen's wages, and declared that if any balance should appear due to them, *they had a specific lien on the remaining shares for such balance*, and those shares were to be sold before the master, and the money applied in the first place to the discharge of such balance. The case of

Doddington *v.* Hallett.

(*m*) 1 Vesey, 497; and see Abbott, 99.

Part owners.

Doddington *v.* Hallett is, however, a single case, never acted upon; and has been expressly over-ruled by a recent decision of Lord Eldon, in ex parte Young. (*n*) The petitioners were part owners of a ship, called the Grenville Bay, with other persons; two of whom, William Lushington, senior and junior, became bankrupts on the 6th of January, 1812. The bankrupts were also the managing owners; and in that character were indebted to the petitioners and the other owners 287*l.* on balance of accounts for the freight and earnings of the ship, after taking credit for the outfit, amounting to 2234*l.*; which sum the bankrupts had not paid; and after the bankruptcy the other owners were obliged to pay it. The assignees sold the share of the bankrupts for 780*l.* The petition prayed an application of the proceeds of the share of the bankrupts in the ship, freight, &c. towards satisfaction of the sums so due to the petitioners and the other owners. The Lord Chancellor observed, "The difficulty in this case arises upon the decision of Doddington *v.* Hallet, by Lord Hardwicke; which is directly in point. That case is questioned by Mr. Abbott, (*o*) who doubts what would be done with it at this day; and I adopt the doubt. The case, which is given by Mr. Abbott from the register's book, is a clear decision by Lord Hardwicke, that part owners of a ship, being tenants in common, and not joint tenants, have a right, notwithstanding, to consider that as a chattel, used in partnership, and liable, as partnership effects, to pay all debts whatever, to which any of them are liable on account of the ship. His opinion went the length, that the tenant in common had a right to a sale. There is great difficulty upon that case; and the inclination of my judgment is against it: but it would be a very strong act for me, by an order in bankruptcy, from which there is no appeal, to reverse a decree made by Lord Hadwicke in a cause. From a

Ex parte Young.

Part owners have no specific lien on the ship in respect to advances made by them for the use of the ship, or for balances due to them from other part owners on account of the ship.

(*n*) Vesey and Beames's Reports, Vol. II. p. 242.

(*o*) Abbott, p. 99.

Part-owners.

manuscript note, I know it was his most solemn and deliberate opinion, after great consideration, that the contrary could not be maintained; and there is no decision in equity contradicting that." Upon a subsequent day, the Lord Chancellor said that, after great consideration, he must decide against the case of Doddington *v.* Hallett.

Another important property, resulting from this relation of part owners being tenants in common, is, that upon the death of any one of them, his share goes, as his personal assets, to his representatives, his executors, or administrators; in short, that his partners, as such, can have no claim on it in the way of lien, nor can derive any right from his death which they did not possess in his lifetime. Part owners of ships are necessarily in one or the other of two conditions with respect to the management of the common concern; either they have made the management of the ship a subject of an express agreement, or they have left it open to their will, according to the occasion, and as they may agree amongst themselves upon each particular venture. In the one case, the express contract and agreement regulates the rights and duties of the parties, and the law has only to enforce it according to its legal and equitable construction. But, in the other case, which frequently occurs where new part owners are introduced by death, or sale, it becomes necessary for the law to interfere to prevent the wilfulness of one party from injuring the interest of all the others. The rule of law, in case of dissensions amongst part owners, is this:—that the majority, in value, may employ the ship, but shall give a stipulation, in a sum equal to the value of the shares of the dissentient partners, that they will bring back and restore the ship, or will pay them the value of their shares. (*p*) Upon such stipulation being given in the proper form, and in the due Admiralty office, the dissentient part

Of the employment of the ship when part owners disagree.

(*p*) Ouston *v.* Hebden, 1 Wilson, 101.

Part owners.

owners are relieved from all expences of the voyage and outfit on the one part; and, on the other part, are not entitled to a share in the profits of the undertaking; the ship sailing at the charges, risk, and for the profit of the others. But, in order to entitle themselves to this indemnity, the dissentient part owners must either arrest the ship, in which case the Admiralty detains it, until the stipulation be entered into and delivered; or they must give a formal notice to the other part owners of their dissent, and then sue upon the equity of the case. For without the arrest of the vessel, or this formal notification of dissent, the other part owners will be considered by the law as being within the rule with respect to tenants in common; that as all and each have a right to possession, so one of them cannot have an action against the other for any exercise, use, and possession, which does not destroy the common property. But if by any act of a tenant in common, or part owner of a ship, the common property be destroyed, such part owner, being a wrongdoer, is liable, like any stranger, to an action of tort. (*q*)

Barnardiston *v.* Chapman, MSS.

Thus, in Barnardiston *v.* Chapman, which was trover for a ship, the main question was, whether the plaintiff, who was tenant in common of one moiety of a ship, could maintain an action of trover against the other tenants in common for taking the ship out of his possession by force, and carrying it away. Upon hearing this case, on a point reserved, Lord KING says, in his MSS., "We held, that if one tenant in common of a personal indivisible chattel bring trover against a stranger, if the stranger do not plead the tenancy in common in abatement, he can have no benefit of it in evidence upon the general issue; and that if one tenant in common destroy the said thing in common, the other tenant in common may bring trespass or trover against him; and, therefore, in this case, if the defendants had burnt or destroyed the ship, this action

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(*q*) 4 East. 121, and Horn *v.* Gilpin, Amb. 251.

Part owners.

would have been maintainable against them; but where one tenant in common does not *destroy the thing in common, but only takes it out of the possession of the others,* and carries it away, there no action lies by the other tenant in common; which being the case, we held this action would not lie." Afterwards, he says, the cause was tried again at the Sittings in London, when the facts were more distinctly brought forward. It then appeared that the plaintiff was tenant in common of one moiety of the ship called the Triton, and the defendants tenants in common of the other moiety; and the ship being in the possession of the plaintiff, the defendants forcibly took it out of the plaintiff's possession, secreted it from him, so that he knew not where it was carried; changed the name of the ship, which afterwards came into the possession of one Dean, who sent it to Antigua, where the ship sunk, and was entirely lost. And the plaintiff's counsel insisted that the thing in common being thus destroyed, the defendants were to answer for it to the plaintiff. But the defendants' counsel insisted, that one tenant in common is only answerable to the other tenant in common for an actual destruction, to which King, C. J., agreed; but left it to the Jury, upon the whole circumstances of the case, whether, by the defendants' force, the ship was actually taken from the plaintiff, and secreted, and carried out of his power to preserve the ship; and a destruction happening in those circumstances, whether it should not be found to be a destruction by the defendants' means; which the Jury accordingly found, and gave the plaintiff 110*l.* damages; which being afterwards moved in court, in Michaelmas term following, the court unanimously agreed to the Chief Justice's direction, and would not grant a new trial. (*r*)

If a part owner destroy the ship, he is subject to an action of trover or trespass.

But upon the principle, that as every part owner has a

(*r*) See 4 East. 123, 124, which contains a full note of this case.—See, likewise, *ante*, p. 224.

Part owners.

Strelly *v.* Winson.

right to a possession and use of the chattel, a court of law or equity can give no redress to one part owner for any consequence merely resulting from the ordinary use of the vessel. This was decided in the case of Strelly *v.* Winson. The circumstances of this case were as follows. (*s*) There were three part owners of a ship: one of them refused to fit out the ship for sea; the others sent her out upon a a voyage without his consent, and she was lost. Upon a bill filed in the Court of Chancery, it was decreed that in this case the loss of the ship should be equally borne by all three; for though one of the partners did not consent to the fitting out of the ship, yet he would have been intitled to one-third part of the freight, and in this court should have had an account of the third part of the profits of that voyage. And so, where one tenant in common receives all the profits, he shall account in this court as bailiff to the other two for two-thirds. But, in case the other two part owners had applied to the court of Admiralty, as regularly they ought to have done, that court would have made an order, that upon one part owner's refusing to navigate the ship, the other two should have liberty to do it alone, and should not have been accountable to the part owner that refused to join for any part of the profits; and then, in case the ship had been lost, the whole loss must have rested on those two that sent out the ship. But, in the present case, in regard the third person, who refused to join with the other two, would have been entitled to a share of the profits of the voyage, if any had been made by the ship, he ought to bear his proportion of the loss. *Qui sentit commodum sentire debet et onus.*

The Court of Admiralty has authority to arrest a ship, upon the application of a part owner, until security be given by

But although, where there are several part owners of a ship, the owners of the less shares may arrest the ship in the Court of Admiralty, and compel a security to be given by the others before they shall be permitted to navigate

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(*s*) 1 Vernon, 297. Skinner, 230.

the other part owners, but not to direct a sale of the ship.

Ouston *v.* Hebden.

the ship out of port, yet the Court of Admiralty can do nothing more than detain the ship till a reasonable security be given, and has no authority to *direct a sale.* This was determined in the case of Ouston *v.* Hebden, (*t*) which was an application to the Court of King's Bench for a prohibition; the defendant, who was a part owner of the ship Scarborough, having procured a warrant from the Admiralty, and arrested her in port, it appeared that the ship was built at Scarborough; that the builder sold one-third part of her in sixteen parts, retaining the other two-thirds of her to himself; that the whole ship was worth about 500*l.*; that the builder mortgaged his two-thirds, and died; and that his widow and representative sold the same absolutely to Ouston, who was now the master as well as owner of two-thirds; that this sale to Ouston was made without the consent of the other part owners, and without any security given to them by Ouston; that he, being master and chief part owner, insisted upon going a voyage against the will of the other part owners; that he refused to pay them for their shares, (they desiring not to continue any longer part owners with him,) or to sell the ship, and distribute the money among them in proportion; and the libel in the Admiralty concluded by praying that the ship might be sold, or that they might have such other remedy as the court thought proper. Ouston, in his answer to the libel, alleged that Hebden's share was not worth more than 50*l.*; that the remaining parts were worth 450*l.*; that the other part owners agreed to his (Ouston's) purchase, and did not insist upon his giving security before the institution of the suit in the Admiralty. He further alleged, that there was no such usage, as set forth in the libel, for the Court of Admiralty to sell the ship; and he insisted that the ship should go the voyage; and suggested, for a prohibition, that the Admiral had no jurisdiction in ships in port. LEE, C. J., "Generally speaking, the Court of Admiralty has no jurisdiction of matters

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(*t*) 1 Wilson, 101.

Part owners.

or contracts done or made at land; but this particular case must be determined upon the whole case as it appears upon the pleadings. Now, the libel concludes with praying that the ship may be sold, &c. *or that the party libelling may have such other remedy as that court shall think proper.* I have no doubt that the Admiralty has a power in this case to compel a security; for this is a proceeding in *rem*, and not in *personam;* and this jurisdiction has been allowed to that court for the public good, as is confirmed by the case cited from Fitzgibbon, where it is said that courts of law have allowed it. Indeed, the admiralty has no jurisdiction to compel a sale; and if they should do *that*, you might have a prohibition after sentence, or we may grant a prohibition against selling, or compelling the party to sell, or to buy the shares of the others, which was agreed to, *per totam curiam;* and the rule as to that was made absolute, but as to compelling a security to be given the rule was discharged."(*u*)

The Court of Admiralty cannot interfere where the shares of the part owners are not ascertained.

This case is considered as having finally settled the law upon the point, that a part owner may arrest the ship to compel a security, but that the Court of Admiralty has no power to order a sale. This court, indeed, is open all the year round to applications by part owners to restrain the sailing of ships, without their consent, until security given to the amount of their respective shares; but where the shares are not ascertained, the Court of Admiralty has no jurisdiction; and, in such case, the Court of Chancery will exercise a concurrent jurisdiction by injunction, restraining the sailing of the ship until the share of the party complaining be ascertained, and security given to the amount of it. And, in such cases, the court will refer it to the master to make an inquiry, and settle the security accordingly.(*w*) But in all such cases the

Concurrent jurisdiction of the Court of Chancery.

(*u*) 1 Wilson, 103 See, likewise, Roll. Abr. 530. 1 Lord Raymond, 223. Fitz. 192.

(*w*) Haly *v.* Goodson and Another, 2 Merivale, 77.

Part owners.

application to the Court of Chancery must be as expeditious as possible; and an injunction was lately refused to restrain the sailing of a ship upon the application of a part owner, where the ship was in preparation for sailing the following day, and there were no circumstances to account for the delay in the application.(*x*)

Part owners may at all times alienate their interests.

It seems scarcely necessary to say, that a part owner of a ship may part with his interest to another person at any time. "A rule (says an excellent writer,) better adapted to the present state of commerce than that which formerly prevailed amongst some of the nations of the continent, and which did not permit the sale of a ship until after a possession of three or more years; or, at least not till after the performance of one voyage, at the charge and risk of the part owners.(*y*) The old rule appears to have been framed with a view to the interest of the master, who, in former times, was a principal owner, and was the person who, with the pecuniary assistance of the other owners, generally caused the ship to be built in the expectation of being employed in the command; an expectation that might be defeated, if others could sell their shares to strangers who, acquiring a majority of interests, might appoint a friend of their own."

Part owners must have their names inserted in the ship's registry.

We have already shewn that there is no such thing as an equitable title to ships; that the registry acts are unyielding forms, from which the law never departs; deeming always that the paramount interest of the public good requires such certificates, and that the most effectual means of securing compliance with these acts is the penalty of invalidating all purchases and contracts in which they are not observed. The registry acts are always a necessary part of every title to a vessel. A part owner, therefore, being a proprietor, must be registered as such, or the

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(*x*) Christie *v.* Craig, 2 Merivale, 137.

(*y*) Abbott, 97; and Molloy, B. ii. c. 1. sect. 3.

Part owners.

law does not recognize him as a proprietor. Unless he be a registered owner, he can have no title to the ship or her earnings; and if he brings any action, or files any bill for accounts or profits, it will be a sufficient answer on the part of the defendant, that his name is not included in the ship's register. (*a*)

Wright *v.* Hunter.

One part owner may bind another for things necessary to the ship.

Part owners have an interest in the ship in common, and a dominion for each of their distinct parts. Upon the first part of this principle, if a part owner order any necessary repairs of a ship, or provide her with necessaries, his partners are thereby liable, in common with himself, to an action for the price of them. (*b*) The case was this: The plaintiff, together with several others, were partners in a ship, the plaintiff having a certain share to himself, and the defendants, and the other partners, holding the remaining shares in conjunction. Debts were incurred on the partnership account; a balance was struck, and the plaintiff paid his adjusted proportion of such debts into the hands of the defendant and the other partners, who were the managing owners, in order that it might be by them paid over to the ship's creditors. They did not do so, and the plaintiff had accordingly to pay the money over again to those creditors. Upon this he brought his action against the defendant, one of his former partners and part owners in the ship. An objection was started, that the defendant was at most liable only for a proportion of the sum. But Lord KENYON said, " that there was no foundation for it. That between a creditor and the partners (and the plaintiff having paid the debt was a creditor,) all are liable for the whole debt; though, as between the partners themselves, each is only answerable for his respective share; and the plaintiff was here

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(*a*) Camden *v.* Anderson, 5 T. R. 709. Ex parte Yallop, 15 Vesey, 60. Stringer *v.* Murray, 2 Barn. and Ald. 248. See, likewise, *ante*, pag. 298, and the following pages to the end of Chap. VII. on the registry acts.

(*b*) Wright *v.* Hunter, 1 East, 20.

Part owners.

in the relation of a creditor to the other three partners, because he had paid the defendant after the bankruptcy, and the severance of the partnership."

One part owner cannot bind another for things not necessary for the ship.

Upon the second part of the principle above stated, namely, that each part owner has a dominion as to his distinct part, one part owner cannot bind another for things not *necessary* for the ship. Thus, for example, one part owner cannot oblige another to pay any part of a premium of insurance, ordered without his privity.(*c*) But if such part owners have a relation of actual partnership superinduced over their other relation as part owners of the vessel, they manifestly come under the rule of partnership; and, of course, the act of one binds all the others, not indeed as part owners, but as partners. The case of Hooper *v.* Lusby is here an important case in point as recognizing, very explicitly, the distinction between part owners and partners.(*d*) This was an action by insurance-brokers, in London, to recover the premiums and commission upon the effecting of several policies of insurance for the defendants, merchants, at Great Grimsby. It was proved that the defendants were members of a commercial company, which carried on business under the firm of Garniss, Corden, Burringham, and *Co.;* and that the policies in question were effected in consequence of a letter written by one of the defendants, in the name of the firm, ordering insurance to be done "on account of the company," on two ships called the Commerce and the Christiana. On the part of the defendant it was insisted, on the authority of French *v.* Backhouse, 5 Burr. 2727. that this action could not be maintained. The defendants were part owners of the ships insured, having separate shares in them. Therefore, one had no authority to insure for the others. Lord ELLENBOROUGH said, that one part owner, even if he be ship's husband, has no implied authority to insure for the others. The distinction was between part

Hooper *v.* Lusby.

(*c*) French *v.* Backhouse, 2727. (*d*) 4 Camp. 66.

Part owners.

owners and partners. "According to the evidence, the defendants carried on business together in partnership, under the firm of Garniss, Corden, Burringham, and Co. and the insurances were ordered in the name, and on account of, the firm. Had there been any case holding that the defendants, under these circumstances, were not jointly liable, I should have been very much inclined to over rule it; but the authority referred to is not in point." A verdict was given for the plaintiff. (*e*)

Smith *v.* De Silva.

Another principle is, that as part owners are very frequently in the relationship of dormant partners; so, if a person giving credit to one of them for *necessaries* for the vessel, does not know at the time that there are other part owners, he *may* sue him alone from whom he receives the orders. (*f*) If one part owner become a bankrupt, and the other part owners have previously paid the expence of the outfit of a vessel at that time on her voyage, they may deduct such expence from his share of the profits payable to the assignees. The case of Smith *v.* De Silva, (*g*) was taken out of their principle, by the circumstance of the agent, employed by the three partners to provide the vessel, having taken from the bankrupt a promissory note to himself for his share of the outfit. Upon the principle of his having made the debt his own by taking such note, it was determined that the full share of the profits should be paid to the assignees of the bankrupt, and that the other partners (who had paid two-thirds of the amount of the bankrupt's notes to the ship's

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(*e*) See the case of Bell *v.* Humphries, 2 Starkie, 345, in which Lord Ellenborough held, that a managing owner, and a part owner, could not bind another part owner by effecting an insurance on the ship without his authority. "Managing owners, (said his Lordship,) had a right to order every thing to be done which was necessary for the ship; but a share in a ship was the distinct property of each individual part owner, whose business it was to protect it by insurance; and the insurance of another could not be binding upon such proprietors without some evidence importing an authority by them."

(*f*) Abbott, 97.

(*g*) Cowper, 469.

Part owners.

husband,) could not deduct it from the bankrupt's share of the profit.

If any difficulty or dispute, as to the ship's accounts, arise amongst part owners, the ordinary remedy is by application to a court of equity. In Robinson *v.* Thomson,(*h*) it was decided by the Court of Chancery, that an account of the profits of a voyage settled by the major part of the part owners should conclude the remaining minority. But if they have entered into a written agreement amongst each other, by which one of them is appointed to manage the ship, as the husband, and to render an account, upon the conclusion of every voyage, of the profit and expence; such husband is bound to one and all of them to produce such an account within a reasonable time; and each may have his action against him at *common law* for a breach of the agreement.(*i*)

Part owners should join in actions relating to the ship and its concerns.

In the dealing of part owners with strangers for the concern of the ship, they make in law, like joint tenants, but one owner; and, therefore, in the case of any injury to the ship, they should join in one action at law. But if any single part owner should bring an action for a damage to the vessel, the defendant must plead this circumstance of a tenancy in common in abatement; otherwise the plaintiff may recover damages proportionable to his interest in the vessel.(*k*) But in an action on the case in the form of tort against one of several joint owners of a ship, for not safely conveying goods which had been delivered to him by the plaintiff for that purpose, it has been determined in the Court of Common Pleas, (contrary to a decision in K. B.) that the defendant may plead in abatement that the goods were delivered to him and his partners jointly, and that his partners are not sued.(*l*)

(*h*) 1 Vern. 465.

(*i*) Owston *v.* Ogle, 13 East. 538.

(*k*) Addison *v.* Overend, 6 T. R. 766.

(*l*) Powell *v.* Layton, 2 N. R. 365. sed *quære*; and see post. p. 372.

Part owners.

So, if one of two part owners of a chattel sue alone for a tort, and the defendant do not plead in abatement, the other part owner may afterwards sue alone, and the defendant cannot plead in abatement in such action.(*m*) But in an action for the freight of a vessel, shared in parts, such freight being in every respect a partnership property, all the part owners ought to join; or the defendant may avail himself of the objection, as ground of nonsuit, at the trial. The distinction is here between torts and contracts; all contracts with such parties necessarily being entire, and, therefore, with respect to all and each, constituting but one claim and right of action. With respect to part owners, indeed, it should be constantly remembered, that, as regards the vessel and its concerns, they are for the most purposes partners; and upon this principle it was determined by Lord Eldon in ex parte Christie,(*n*) that the master of a ship having become bankrupt, the owners being indebted to him for the concerns of the ship, whilst he also was indebted to some of them generally on distinct concerns, that the latter should not set off their several demands against the claim of his assignees for their shares of the general debt.

Of actions brought by, or against part owners.

But though part owners want some of the artificial constituents of joint tenantcy, or in other words, of partnership, (such as holding their respective shares by several titles, and not by one,) the law, following the equity and manifest analogy of their character with partners in the greater number of cases, considers them in most instances as partners, and under this view generally both gives them the rights, and exacts from them the duties. Upon this principle, an action upon any contract relating to the ship should regularly be brought against all jointly, as *partners* in the ship. But if all are not sued, the defendants can only avail themselves of the objection by plea in abate-

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(*m*) Sedgworth *v.* Overend, 7 T.R. 279.

(*n*) 10 Vesey, 105.

Part owners.

ment; and if they omit to plead such a plea, the plaintiff will recover his whole demand, and the defendants must afterwards call upon the others for contribution. Where the declaration, assuming the form of an action *ex delicto*, alleges a breach of duty, and not a breach of promise, it has been much questioned, whether one part owner, who is sued alone, can avail himself of this plea, and also whether, if the action be brought against more persons than appear at the trial to be part owners, the plaintiff can sustain his suit against those who appear to be so, or must fail altogether. In a case of this nature, the Court of King's Bench decided some time ago that the plea was not admissible; (*o*) but, in another case, the Court of Common Pleas afterwards held it to be admissible; (*p*) and following up its own judgment, decided in a third case, that the plaintiff, who had failed in proving all the defendants to be part owners, must fail altogether. (*q*) A writ of error was brought on this latter judgment; which was argued before the twelve judges, and it was understood that much difference of opinion existed among them: but the cause was decided on a different ground. (*r*) In a fourth case, of a similar nature, wherein the declaration expressly alleged a bargain, and complained of a deceitful warranty in the nature of a wrong, the action being against two persons, and the plaintiff proving a sale by one alone; the Court of King's Bench held that he could not succeed against that one, but must wholly fail. (*s*) But this case is not to be considered as weakening the authority of Govett *v.* Radnidge, or as adopting that of Powell *v.* Layton. For the case of Weal *v.* King was matter of contract merely, and was only *formally* turned into a tort. The question, therefore, still remains undecided.

Of actions brought by, or against part owners.

(*o*) Govett *v.* Radnidge, 3 East. 52.

(*p*) Powell *v.* Layton, 2 N. R. 365.; see *ante*, p. 370.

(*q*) Max *v.* Roberts, 2 N. R. 454.

(*r*) *Ibid.* in Error, 12 East. 89.

(*s*) Weal *v.* King, 12 East. 452. Abbott, 104.

Part owners.

If a tradesman, who has repaired a ship, take from some of the part owners sums equivalent to their shares, they still remain responsible for the residue, if not paid by the others, unless at the time of the payment the tradesman specially agree to discharge them from all further demand, upon some good consideration inducing him so to do, such as payment before the expiration of the usual credit; or release them by deed.(*t*) But where a person, who has furnished a vessel with cordage, takes a bill for the amount from the managing owner, and renews that bill upon its being dishonoured, the other part owners are discharged. This case proceeds upon the principle that the creditor has made an election, and preferred the single credit of the managing owner to that of the joint partnership. So, likewise, where the party, sued as a partner, for the value of goods furnished for the *owners* of a ship, was neither a partner, in fact, at the time, (having parted with his share some time before,) nor held himself out as such, having before withdrawn his name from the description of the firm at the counting-house, and sent circular letters to the correspondents of the house, notifying the change; he cannot be charged merely because, having defectively conveyed his whole share in the ship before that time, he had subsequently joined with the assignees of the bankrupt partners in the ship in making a good title to it to a purchaser from the assignees.(*u*) We have already shewn that if the names of two partners in trade appear (amongst others) in the certificate of registry, as part owners of a ship, the registry acts do not prevent the shewing how, and in what proportions, the several owners are respectively entitled; and though such part owners may derive title under different conveyances, yet

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(*t*) Teed and another *v.* Baring and others, before Lord Ellenborough, C. J., at Guildhall, 1806. See likewise Reed *v.* White, 5 Esp. 122; and Abbott, 105. The case of Read *v.* White seems to depend upon particular circumstances; and must not be considered as establishing any general rule of law.

(*u*) M'Iver *v.* Humble, 16 E. R. 169; and see *ante*, p. 324.

Part owners.

if their shares were purchased with the partnership funds, and treated by them as partnership property, and the partners become bankrupt, these shares will be considered as the joint property. (*w*)

It has been seen by previous cases that partners in a ship are, like partners in trade, tenants in common, and not joint tenants, between whom there is no survivorship: but the share of each of them shall go to his executor, and the executor shall join in a writ with them who survive. It has likewise been shewn that, though they have separate interests, all should sue during their joint lives for any cause of action which *concerns* the ship, as for running it down; and if they do not, it may be pleaded in abatement. (*x*) So, they are all *bound* to join in an action for any *contract* concerning the ship, as for freight, &c. But whether any one be part owner of a ship must be determined by the register; for since these acts, as we have before shewn, they, whose names appear upon the register, can alone have a legal or equitable title to the vessel. (*y*) Thus, as it has been adjudged by previous cases, if four partners in trade jointly purchase and pay for a ship, but cause her to be registered in the names of two only, the interest cannot be averred in the four in order to maintain an action on a policy of insurance on freight; yet, in general, an equitable interest is sufficient to maintain such an action. So, if a ship be purchased by one partner, and registered in his name only, it will be deemed, in point of law, and even in a court of equity, by reason of the registry acts, as the separate property of that partner, although the purchase and outfit be taken out of the partnership funds, and the earnings placed to the partnership account. (*z*) But if the names of the part-

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(*w*) Ex parte Jones and others, 4 Maule and Selwyn, 450; and see *ante*, p. 298.

(*x*) See Addison *v.* Overend, *ante*.

(*y*) Camden *v.* Anderson, 5 T. R. 709; and see *ante*, pag. 298.

(*z*) Curtis *v.* Perry, 6 Vesey, 759; and ex parte Yallop, 15 Vesey, 60.

owners appear on the certificate of registry, the provisions of the act of parliament are satisfied; and it may be shewn by evidence *aliunde* how, and in what proportion, such partners are interested. But where A., B., and C. agreed to purchase a ship, and contracted that it should be registered in the name of A. and B. only, but that the profits of the ship should be divided by the three; C. filed a bill against A. and B. for an account of the profits of the vessel; a general demurrer was put in on the ground of public policy: the Vice-Chancellor held, that such an agreement could not be assisted by a court of equity, being in manifest contravention of the express enactments of law, and a design to evade the publicity required by the registry acts.(*a*)

(*a*) Battersby *v.* Smith, 3 Wilson, 110; and see *ante*, Chap. VII. on the registry acts, page 314.

CHAPTER II.

OF THE MASTER.

THE master of a vessel is the person commissioned to navigate and manage her. In considering this relation, there are three points to which the attention of the reader must chiefly be directed:—1. The qualification of the master, and his authority with respect to the employment of the ship. 2. His authority with respect to repairs, and other necessaries furnished to the ship. 3. His duties and responsibility to the owners. The two first heads will constitute the subject of the present chapter.

Of the qualification of the master and mariners.

First, as respects the qualifications of the master and seamen, they fall under the navigation laws, and have been previously stated and explained in a former part of this work.(*a*) It will be sufficient, therefore, to repeat, summarily, in this place, that these qualifications are almost wholly contained in the 34 Geo. III. c. 68. It is enacted in this statute, (repeating the general provisions of the former navigation laws, and with a view of removing all doubt as to the various terms employed with respect to persons qualified to be masters of British ships or British sailors,) that every vessel employed as a British vessel, in the trade of Great Britain, shall be navigated by a master, and three-fourths of the mariners at least, British subjects. This statute, however, as is stated in the preceding part of this treatise,(*b*) contains a proviso, by

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(*a*) See *ante*, pag. 72, 73, and 74.

(*b*) See *ante*, pag. 75.

Of the master.

which the King is enabled to issue his proclamation during war, permitting merchant ships and privateers to be manned with foreign mariners, in the proportion of three-fourths of the proper quota for navigating such vessels. The cases, therefore, under this act *generally*, require the master and mariners to be British subjects, except in the five following instances:—1. By proclamation during war time. 2. In the case of negroes and lascars, employed in the navigation of the seas of America and the West Indies; or in the seas to the eastward of the Cape of Good Hope. (c) 3. East India ships, manned with lascars, are deemed legally navigated, if there be seven British seamen to every hundred tons. (d) 4. If a sufficient number of British seamen cannot be procured by the East India Company in the East Indies, or by any ship sailing under their licence, or legally trading by the late act, (e) for their voyage to Europe, the governments there are empowered to grant licences to such ships to sail with a less proportion of British seamen than is required by law. (*f*) 5. And in the case of any ships employed in trade only between the ports and places within the limits of the Company's charter, including the Cape of Good Hope, such ships may be manned and navigated *wholly* by lascars, or any Asiatic sailors. It may, perhaps, be termed a sixth exception, that foreign sailors and mariners, serving three years on board British ships of war, are to be deemed British subjects; and, upon due certificates of good behaviour from the commanding officer on board the vessel in which they have served, may be employed as masters or mariners of British ships, and are holden within the meaning of the navigation laws as British seamen. But any merchant who employs them must be careful of two points: in the first place, that they have such certificate; and, secondly, that they have taken the oath of allegiance

Exceptions to the usual qualification of master and mariners.

(c) 34 Geo. III. c. 68. and 42 Geo. III. c. 61.

(d) 55 Geo. III. c. 116.

(e) See *ante*, pag. 93.

(*f*) 55 Geo. III. c. 116.; and see *ante*, pag. 96, and following pages.

Of the master, &c.

to his Majesty, before some justice of the peace, or officer of his Majesty's customs, in any of the ports of the King's dominions. (*g*)

It should, likewise, be particularly noted under this head of the qualification of the masters and seamen, that any person, whether British or alien, who shall take an oath of allegiance to a foreign state, thereby loses his qualification of being regarded as a British subject, by birth or service, unless such oath, in the case of an alien, have been taken before his qualification by service to be a British master or seaman, or, unless being a British subject, he shall have taken it under the terms of some capitulation, upon the conquest of any of the dominions of his Majesty by the enemy, and for the purpose of obtaining the benefit of such capitulation only. But as owners in many cases may be ignorant of their masters and mariners having taken such oath, it is provided that a ship shall not be forfeited, if the owners can make it appear that they were ignorant of such disqualifying circumstance. (*h*)

Such, therefore, are the qualifications required by law, as respects the master and mariners of British ships.

The authority of the master, with regard to the employment of the ship, is a more ample head, and requires a fuller explanation.

Of the authority of the master, as regards the employment of the ship.

The master of a ship is necessarily in one or other of two relations; he is either a part owner, to whom his copartners have trusted the government and management of their common property; or he is the mere captain, in which case he is the confidential servant or agent of the owners at large. In both cases, the general rule is, that

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(*g*) 34 Geo. III. c. 68.; and 42 Geo. III. c. 61.; and see *ante*, pag. 73.

(*h*) 34 Geo. III. c. 68.; and 42 Geo. III. c. 61.; and see *ante*, pag. 72, 73, and 74.

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the owners are bound to the performance of every lawful contract made by him relative to the usual employment of the ship. Being, however, not only the representative of the owners, but being himself, when in foreign and remote parts, the only person visible and known, the law, acting upon this circumstance, makes him responsible, not only as agent, but answerable as for his own contract. The principle of this rule is manifest. It would be of inconceivable mischief and impediment in commercial dealing, if a foreign merchant, making a contract of freight with the master, should be compelled for any consequential injury to seek out the owners. The law, therefore, in order to avoid this inconvenience, gives all who deal or contract with the master the two-fold remedy, that they may proceed against either or both. (*i*)

The master and owner, therefore, being to each other in the relation of master and servant, or principal and agent, if goods be lost, injured, &c. by the wilfulness or negligence of the master, the owners are liable; being necessarily in a better condition of knowing the skill, honesty, and trust-worthiness of their servants, than those who only casually employ them; and having, moreover, the profit and price of the freight of the ship.

Boucher *v.* Lawson.

But the owners are liable only for such contracts of the master as he shall make in the necessary and usual employment of the ship, or for such acts as he shall do belonging to his character as master within this limit. And, therefore, in the case of Boucher *v.* Lawson, (*k*) it was decided by Lord Hardwicke and the Court of King's Bench, that the owner was not liable for the act of the master, such act not belonging to his character of master; and, therefore, not to be presumed within their express or implied consent. The case was this:—The master had received

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(*i*) 1 Boson *v.* Sandford, Carthew, 238.; and Abbott, 115. 63. Morse *v.* Sluce, 1 Ventris. 190.

(*k*) Rep. temp. Hardwicke, 85.

Of the master, &c.

some Portugal coin, to convey from Lisbon to London; and, according to custom in these cases, the price of such conveyance was his own perquisite. He embezzled the coin, and an action was brought by the proprietor against the owners to recover the value. The court decided, that if the vessel had been carrying goods upon hire, the circumstance of the price of carrying coin being a perquisite of the captain, would not vary the liability of the owners, as it would make no difference in the equity of the case, whether the master received such price under the name of wages or perquisite. But in the case before them it did not appear that the vessel was so employed; it was, therefore, a mere private act of the captain, and, therefore, not within the ordinary presumption of the law, so as to make the owners responsible.

In explanation of this principle, Lord KENYON said, in another case,(*l*) "The defendants (owners) are responsible for the acts of their servant in those things that respect his duty under them, though they are not answerable for his conduct in those things that do not respect his duty to them; as if he were to commit an assault upon a third person in the course of his voyage."

Of the authority of the master as regards the employment of the ship.

But as the owners are bound by the act of the master, under the presumption of law that he is their agent and authorized servant; so if the owners appear in their own persons, and make a special contract for the employment of their ship, the master, of course, cannot annul such a contract, and substitute another for it. The principal here is, that *expressum facit cessare tacitum;* and the appearance of the principals in their own person supersedes the discretionary act of their agent. In Burgon *v.* Sharpe and others,(*m*) where this was the precise point before the court, Lord ELLENBOROUGH said, that the captain was captain for the voyage originally agreed upon by the

Burgon *v.* Sharpe.

(*l*) Ellis *v.* Turner, 8 T. R. 531.

(*m*) 2 Campb. 529.

Of the master, &c.

owners; and, being employed only upon that express voyage, every thing beyond the voyage was beyond the scope of his authority as captain. As such, he had no power to change that voyage for another. His Lordship however added, "The person who is entrusted with the command of a ship *may* be vested with a complete controul as to her employment and destination; but this is superinduced upon his authority as captain."

Dewell *v.* Moxon.

In all such cases, however, the court will give particular attention, not only to the general authority of masters by the practice of merchants; but, still more strongly, to any express and particular contract, which may have been made between the master and his owners. So in Dewell *v.* Moxon and another, (*n*) one of the questions before the court being, whether the captain of a vessel, sent to earn freight, had authority to carry a cargo, freight free; it was collaterally decided, that he had no such authority.

The two contracts under which merchant ships are ordinarily employed are *charter-parties, and contracts for freight* with one or more persons unconnected with each other. These contracts will be the subject of the third part of this treatise. In *charter-parties*, the whole vessel is ordinarily let out for a determinate voyage to one or more places, and the instrument by which it is so let is termed the *charter-party*. This is most commonly the sole act of the owners themselves. In contracts for freight, the master and owners, or the master singly, take goods on board to convey them to the place of the ship's destination. Both of these contracts may be made singly by the master himself. In freight, this often happens. In charter-parties, when the vessel is in a foreign port, it sometimes occurs. As respects such charter-parties, the law of England will not hold the

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(*n*) Dewell *v.* Moxon, 1 Taunt. 392.

Of the master, &c.

owner to be bound by the *instrument* itself, if he be no party to it; but if it be made by the master in a foreign port, in the usual course of the ship's employment, the ship and freight are bound, in their full value, to the performance of such covenant. And it is stated in a learned work, and we think very justly, that the owners may be made responsible, either by a special action on the case at the common law, or by a suit in equity, for the faithful performance of the stipulations of a charter-party made by the master, under the circumstances beforementioned. (*o*)

Such, therefore, is the authority of the master, with respect to the employment of the ship; and within such limits may he undertake to employ the vessel upon his own discretion, and may bind the owners to execute his contracts.

Of the authority of the master to order repairs and necessaries for the ship.

Secondly, The authority of the master, as regards the victualling, repairing, and providing the ship with all necessaries, has a still larger extent and more important consequences. It, therefore, requires a more exact and detailed exposition and statement.

As the master is the agent and servant of the owners, and a ship is manifestly a chattel of such a nature as to require repairs and necessaries in places remote from the residence of the owners, and by persons to whom they are totally unknown, it is a natural, and indeed, a necessary presumption of law, that the master has their implied consent to order such repairs, and to provide such necessaries. Under his relation of being agent and servant to the owners in all that is necessary for the ship, the law authorizes him to do such necessary acts, and to enter into such necessary contracts, and holds the owners to be bound by such acts and contracts of the master. Under

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(*o*) Abbott, p. 119.

his relation of being the only ostensible person, with regard to those whom he employs, the law makes him likewise liable in his own person for such necessaries and repairs, and sends him (if a part owner as well as master,) to his copartners for contribution; or if only an agent, to his principal for repayment.

Of the master, &c.

With regard to such repairs and necessaries, therefore, the general rule is, that, in all *necessary* provisioning and repairs made by order of the master, he is himself, in the first place, personally liable; and, secondly, that the owners are liable with him. All who deal with him for such *necessaries* have their election of three remedies,—*first*, To sue the master,—*secondly*, To sue the owners,—and, *thirdly*, (in the case of hypothecation by the master of the ship for necessary repairs, when in the course of a foreign voyage,) a process against the ship in *specie* in the Courts of Admiralty.

But as the master is liable only as the ostensible servant and agent of the owners; so where the owners appear in their own persons, and the credit is manifestly given to them only, the master is not liable, such case not being within the reason of the rule. In the case of Farmer *v.* Davis(*p*) the goods were ordered by the owners before the captain was appointed to the ship. Some of the goods were delivered before he was commissioned; but others of the parcel were delivered afterwards. The question, therefore, for the court was, whether the master was liable for *all* the goods provided,—or so much of them as was delivered *after* his appointment, or was liable at all.— Lord MANSFIELD said, "Where a captain contracts for the use of the ship, the credit is given to him in respect of his contract. It is given to the owner, because the contract is on their account; and the tradesman has likewise

Of the authority of the master to order repairs and necessaries for the ship.

(*p*) 1 T. R. 108.

a *specific lien* (*q*) on the ship itself. Therefore, in general, the tradesman who gives that credit, debits both the captain and the owners. Now, what is this case? The captain made no contract personally. The owners contracted for their ship; the credit was given to them only; and there is not a shadow of colour to charge the captain for any part of these goods."

But where the master is in the exercise of his actual appointment, the law regards him as so completely the agent and confidential servant of the owners, that if he buy necessaries for the ship, and do not pay for them, the owners are responsible to the vendor, though the owners may have *expressly* given the master money for the victualling of the ship. This is upon the ordinary principle of the law of master and servants. (*r*)

Liability of the owner to the master's contracts confined to contracts for necessaries only.

In Yates *v.* Hall, (to which we shall have to refer more fully for another point,) the court said, "If the master borrow money to repair or victual the ship, (or of course, order such provisioning and repairs) when there is no occasion for it, he alone is debtor, and not the owners." The owner's liability to the master's contracts is, therefore, confined to the case of necessary repairs, provisioning, and appointments. If any one trust him for a thing not necessary, he trusts him beyond his commission and authority, and consequently cannot charge his owner. He cannot take up money for his own use, or pledge the ship, or his owner's credit, for his own debt. (*s*) This doctrine is upheld by a series of decisions in our courts of equity and law from very early times. In Speering and others *v.* Degrave and others, (*t*) the master having bought provisions upon credit, and

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(*q*) See this explained afterwards, it not being generally true, but true only for repairs and necessaries in a foreign port.

(*r*) 2 Vern. 643; and Com. Dig. title Navigation, 119.

(*s*) 1 T. R. 73.

(*t*) 2 Vern. 643.

failed, and the tradesmen suing in consequence the part owners, the Court of Chancery held them liable, and decreed that they should pay in the proportion of their shares. The master, the court said, was but the servant of the owners; and it was nothing that they had paid the money to him, if he had not paid it over to the creditors. And in Garnam *v.* Bennet,(*u*) the court repeated, in substance, the same rule; saying, that the repairer of a ship has his election to sue the master, who employs him, or the owners; but if he undertakes the repairs on a special promise from either, the other is discharged. This rule, indeed, that the owners are liable for all necessary repairs and provisioning ordered by the master, is now so established by repeated decisions, that it is unnecessary to confirm it by any additional cases.

Master may order such necessaries *abroad*, as well as at home, and thereby equally bind his owners personally.

Nor does the rule suffer any alteration, whether the master shall have ordered such necessaries, or borrowed the money to provide them, at home or *abroad*, provided the necessity be *proved.* Where the amount is considerable, and the place of the contract abroad, the more usual mode, indeed, is to borrow the money on the ship. But if the master find it more convenient to do it by personal contract, he may adopt this method, and the court will hold his owners liable. Thus, in Evans *v.* Williams,(*v*) where the master had borrowed the money for the necessaries of the ship abroad, on his own contract, and gave in evidence, (though not necessary to the case,) that he could not have obtained the money on the security of the ship, Lord Kenyon held, that the owners were, of course, liable; and that the lender might recover from them.

Master may borrow money in a foreign port, and make his owners liable, provided the money be absolutely necessary for the use of the vessel.

As the master has this right to bind the owners by his contracts for necessaries with others, *a fortiori*, if he pay for

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(*u*) 2 Str. 816.

(*v*) Abbott, 128. See, likewise, Cary *v.* White, 1 Br. Parl. Cases, 284.

such necessaries himself, he may call upon them to repay him. But as the law entertains a very just jealousy of this species of contracts, in which the same person at once incurs and admits his *own* account, those who are in such circumstances should be prepared to prove by the most direct evidence the absolute necessity of such victualling or repairs.

In Rocher *v.* Busher, (*w*) the plaintiff, a merchant at Oporto, claimed the amount of goods and money supplied to the master of the defendant's vessel, at Oporto, for the use of the ship. The counsel for the defendant admitted the liability of the master for necessaries supplied for the use of the ship; but contended that he was not equally liable for monies supplied to the captain, to be subsequently appropriated by him; and denied that the monies had been expended in the use of the ship. But the master being himself called, and giving evidence that certain sums had been so applied, Lord ELLENBOROUGH said, "In strictness, a claim of this kind is limited to articles supplied through necessity. But where the same necessity exists, money may be supplied as well as goods, and the amount recovered. This, however, must not be understood of an indefinite supply of cash, which the master may dissipate, but only such as is warranted by the exigency of the case, as for *the payment of duties, and other necessary purposes*. I once held, that proof of the strict application of the money to the purposes of the ship was necessary; and Mr. Justice Heath, sitting for the Chief Justice of the Common Pleas, did the same. But I cannot advise the Jury to find more than they may deem *absolutely necessary* for the use of the vessel." (*x*) And

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(*w*) 1 Stark. 27.

(*x*) In this case it was held that the captain was a competent witness to prove the money advanced, and the necessity of the supply.—See Evans *v.* Williams, 7 T. R. 481. *n.* The captain, indeed, is an admissible witness, not on the ground of *necessity*, but on the ground that he stands *indifferent* between the parties.

in Palmer *v.* Gooch, Abbott, L. C. J., ruled, that in an action against the owner of a ship for money supplied to the captain in a foreign port, it was not sufficient to prove the advance of a much larger sum than was necessary for the use of the ship, and an application of *part* of that sum to such uses, the residue being placed to the private account of the captain, but that it was essential to prove the advance of a specific sum; and that such sum was necessary for the use of the ship, and was so applied in fact.(*y*)

Harder *v.* Brotherstone.

But though the owners be liable for necessaries furnished to the ship, and money advanced to the master to purchase such necessaries, so far, and to such an amount, as the strict appropriation of the money supplied can be proved, the obligation is not so specific and ascertained as to supersede the right of the owners to examine the accounts, and to enquire into the necessity; and it has, therefore, been decided upon this principle, that the owner is not bound to honour a bill of exchange drawn by the master in a foreign port for money so supplied to him. In Harder *v.* Brotherstone,(*z*) the first count in the declaration stated, that the plaintiff carried on business as a merchant, at Pernau, in Russia; that the defendant's ship being at that place, a sum of money was necessarily wanted for her use; that thereupon, in consideration that the plaintiff would advance this money, the defendant undertook that a bill of exchange, to be drawn as a security for the amount by the master of the ship on one William Sharples, at Liverpool, should be duly honoured; that the plaintiff did accordingly advance the amount, but Sharples refused to accept or pay the bill. GIBBS, C. J., stated, "That he was clearly of opinion that there was no implied undertaking on the part of the owner of a ship, that a bill of exchange, drawn by the master on a *third person*, for money advanced for the ship's use abroad, should be duly honoured." So, if the master draw upon

(*y*) 2 Starkie, 428.

(*z*) 4 Campb. 254.

his owners for such necessaries, it should seem they would be under no obligation to accept the bill. They would, indeed, be liable to the debt the moment it is contracted: but in collateral obligations of this kind, as between master and servant, principal and agent, &c. it is totally a different thing to be liable to an account, after examination and proof, and to be subject to the instant acceptance of a bill of exchange before such account is ascertained and approved. As sometimes the owners of a vessel employ a supercargo, the contracts which are made by an agent of this description are equally binding with those which the master makes within the scope of his authority. Therefore, in Mitchell *v.* Glennie, it was ruled by Lord Ellenborough, that the owner of a ship was liable for stores and necessaries supplied by the order of a supercargo, after the detention and liberation of the vessel by a foreign power, although the supplies were furnished after an abandonment by the owner to the underwriters.(*a*) So, likewise, the owner of a packet-boat, employed by government, but of which such owner receives the earnings, is liable for the amount of stores furnished for the vessel by the orders of a captain appointed by the postmaster general.(*b*) But the owner of a vessel let to freight for a particular voyage is not liable on the contract of the master for the non-delivery of goods; for the master, under such circumstances, though originally appointed by the owner, must be taken, *pro hâc vice*, to be the agent of the freighter only.(*c*) So, likewise, where the defendant bought a ship taken in execution under a *fieri facias*, in 1805; but not having paid the whole of the purchase-money, the sheriff did not execute a regular assignment till 1810. The defendant, however, was immediately put into possession, and got the vessel re-

Exceptions to the general rule, that the owner is bound by the contract of the master.

(*a*) Mitchell *v.* Glennie, 1 Stark. 230.

(*b*) Stokes *v.* Carne and others, 2 Campb. 339. And see Parish *v.* Crawford, 2 Stra. 1251. More fully reported, Abbott, 22. 5.

(*c*) James *v.* Jones and another, 3 Esp. 27. S. C. More fully reported, Abbott, 23.

gistered in his own name. In 1806, he chartered her to the captain for three years, and interfered no more in the business. Lord Ellenborough held, that the defendant was not liable for stores ordered by an agent of the captain during the three years.(*d*) And the Court of King's Bench refused a rule *nisi* for a new trial, on the ground that the relation of master and owner did not subsist between the captain and the defendant, and that the case of a ship hired for a *definite* period differed from that of a vessel chartered for a *particular* voyage, where the master is always appointed by the owner.(*e*) And, in another case, where the ship was chartered for a particular voyage only, and was put up by the freighter as a general ship, the registered owners were held not to be liable for a tortious conversion of the plaintiff's goods by the master, in the absence of proof that they were received on board by some person appointed by them. (*f*)

(*d*) Frazer *v.* Marsh, 2 Campb. 517 ; and see *ante*, page 356.

(*e*) 13 East. 238. S. C. rather indifferently reported.

(*f*) Mackenzie *v.* Rowe and others, 2 Campb. 482. ; and see *auie*, page 355. Parish *v.* Crawford, 2 Stra. 1256.—More fully reported, Abbott, 22.

CHAPTER III.

OF THE POWER OF THE MASTER OVER THE SHIP AND CARGO, AS TO PLEDGE, OR ALIENATION IN PART OR WHOLE; AND OF BOTTOMRY AND RESPONDENTIA.

IN the preceding chapter we have considered the authority of the master to bind the persons of his owners for the necessaries of the ship. The subject of the present chapter will be, the manner in which the ship may be bound, and the authority of the master to give such an obligation upon the ship itself; or, in other words, to hypothecate or alienate the vessel or cargo in part or whole. We shall consider the title under the three heads; *first*, Whether a ship can be the subject of a specific lien. *Secondly*, Under what circumstances the master may hypothecate the ship; and, *thirdly*, How far he may sell or alienate the ship and cargo, in part, or altogether. In this chapter we shall likewise consider shortly the nature of the contract of bottomry and respondentia.

Of a lien upon a ship.

And, first, with respect to the point, how far a ship may be the subject of a lien.

It has already been said in a previous chapter, that ships cannot be the subjects of a specific lien to the creditors who may supply them with necessaries. There is a two-fold reason for this; in the first place, because lien always presumes the possession of the article by the creditor; and, therein, his power of holding it till his demands are satisfied;—but in the case of a ship, such possession by those who supply it with necessaries cannot occur. For, as regards the master, he is possessed only as the agent and servant of his owners. And as regards those whom he may employ to repair the ship, they have manifestly no other possession, than his workmen; no other possession,

Of lien on ships.

for example, than a builder or carpenter employed to build or repair a house. The other reason why ships are not the subjects of such specific liens is, that it would open the door to the manifest mischief of commerce, and would be an impediment to the most valuable article of public and private property, if either the master for any stores supplied by himself, or any of the dealers with the ship, could arrest the departure of the vessel for accounts afterwards litigated, or of small amount. Under these principles, therefore, the law of England rejects almost wholly the doctrine of lien as regards ships. If a shipwright, indeed, take a vessel within his own docks, or entirely within his own possession, to repair it, he may of course detain it till his demand be satisfied, provided there be no special contract for credit, or custom of trade postponing payment; in the same manner as any other artificer may detain the subject of his own trade under the same circumstance. But if he be not in *actual* possession of the vessel; if it should have quitted his dock, or if he shall have made his repairs without taking the ship into his own mastership and dominion, such shipwright is not preferred by the law of England before other creditors, nor has any lien upon the vessel merely as its repairer, nor even as its builder.

Thus, in two early cases Rich *v.* Coe, (*a*) and Farmer *v.* Davis, (*b*) Lord Mansfield having expressed himself in the general terms, "that a person, who supplies a ship with necessaries, has not only the personal security of the master and owners, but also the security of the specific ship," Lord Kenyon, in the case of Westerdell *v.* Dale, (*c*) took occasion to restrict the general application of this opinion; and it will be seen by the following authority, that such right as a specific lien on ships for repairs and necessaries is not recognized by the law of England.

(*a*) Cowp. 636.
(*b*) 1 T. R. 109.
(*c*) 7 T. R. 312.

Of lien on ships.

In Westerdell *v.* Dale, Lord *Kenyon* observed, "In Rich *v.* Coe, it was said, that the person supplying a ship with necessaries has a treble security; the person of the master, the ship, and the personal security of the owners: but I doubt whether that doctrine is not too generally laid down. Sir J. Jekyll held, in a case before him, that the master could not subject the ship if *in England;* and that was afterwards confirmed by Lord Hardwicke."

This doctrine, indeed, had been previously affirmed by the courts in the two cases of Hoare *v.* Clement, (*d*) and Justin *v.* Ballam. (*e*) In the first of these cases, Clement having supplied the ship with necessaries in an English port, and the ship being afterwards sold to Hoare before his bill was paid, he instituted a suit in the Court of Admiralty against the persons, who were master and owner at the time of the supply, and also against the ship, and Hoare himself. Under these circumstances, Hoare applied to the Court of King's Bench for a prohibition against the Court of Admiralty, to stay the proceedings against him and the ship, which was granted. In Justin *v.* Ballam, Ballam had instituted a similar suit in the Admiralty against a Norwegian ship, for payment of the price of a cable and anchor delivered on board the ship to the master, in the River Thames, upon which Justin applied to the Court of King's Bench for a prohibition. The court decided, that the ship was not liable to the suit; *first*, Because it did not appear that the ship was in her voyage, when she became in distress for want of a cable and anchor, *and at the time of the contract; secondly*, Because there was no actual hypothecation; and they said, that although, by the maritime law, every contract with the master of a ship implied an hypothecation, yet it was otherwise by the law of England, unless expressly so agreed. And again, in Watkinson *v.* Bernardiston, (*f*) where the proceeds of a ship sold had been brought into

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(*d*) 2 Show. 338.

(*e*) Salk. 34. 2 Lord Raym. 805.

(*f*) 2 P. Wms. 367. and Abbott, 135.

Chancery, and the plaintiff, who was the master, claimed money paid by him for the accounts of several tradesmen in London, employed upon his order, to make repairs, and find necessaries, Sir J. Jekyll decreed, that this demand was not a lien on the ship. Sir J. Jekyll, indeed, added in the same decree, that if the demand of the master had been for *wages* paid by him to the mariners, and for money disbursed by him on the ship's account in the course of a foreign voyage, it would have been a lien on the ship. But this part of his opinion has been expressly over-ruled, in the case of Hussey *v.* Christie, and others. (*g*) In this case, Hussey, the master of a ship, had employed several persons to provide her in necessaries abroad; and given his own promissory notes for their accounts. Upon returning to England, and finding his owners bankrupts, he endeavoured to retain possession of the ship as his lien and security. Being forcibly deprived of her by the assignees, he instituted this suit in the Court of Chancery to restrain them from selling the ship till his demands should be paid. The Lord Chancellor sent the case to the Court of King's Bench, where the Judges all concurred in opinion, that the master had not a lien on the ship. (*h*)

Of lien on ships.

Hussey *v.* Christie.

And in two cases before Lord Hardwicke, namely, in Buxton *v.* Snee, (*i*) and Ex parte Shank and others, (*k*) Lord Hardwicke made his decrees upon the same principle. In the first case he said, "I know no case where the repairs, &c. whether they were by part-owners, or sole owner, master or husbands, have been held a charge or lien on the body of the ship." In the latter case, he said, that although the law of Holland gave a person, who repaired a house, or ship, a specific lien, there was no such law in England. The last case, indeed, was particularly

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(*g*) 13 Vez. jun. 594.—See likewise Ex parte Halkett, 3 Vezey and Beames, 135.

(*h*) 9 East. 426.

(*i*) 1 Vez. 154.

(*k*) 1 Atk. 234.

Of lien on ships.

strong; the person who claimed the specific lien, as having repaired the ship, having obtained possession of the money upon the bankruptcy of the owner. And in the case of Wilkins *v.* Carmichael, (*l*) where, upon the bankruptcy of the owners, the master claimed to retain the ship as a lien for his wages and repairs, &c. for which he made himself answerable, Lord Mansfield himself said, "As to the stores and repairs, it is a strong answer to the claim, that, when the demand was made by the assignees, the master had not paid. But if there were any lien originally, it was in the carpenter; the master could not by paying him be in a better situation than his, and *he* had parted with the possession, so that he had given up his lien, if he ever had one. The other creditors had none. Work done for a ship in *England* is supposed to be on the personal credit of the employer. In foreign parts the master may hypothecate the ship." (*m*)

Upon all these cases, it may now be considered as an established rule of law, that neither the master, nor any of those dealing with a ship for repairs and necessaries, can have any specific lien on the ship; except in the case of a shipwright or other artificer having actual and entire possession of the vessel, in dock, in performing his work, and retaining possession till payment.

And even in the circumstance of a shipwright having the vessel in his own dock, the existence of a custom in the port or country, that such shipwright shall only look personally to the owners, will take a ship out of the ordinary rule of goods in the actual possession of the workman claiming a lien; and will prevent such shipwright from having, even in this strong case, any lien upon the vessel.

(*l*) Doug. 101.

(*m*) See likewise Wood and Others *v.* Hamilton, in Dom. Prac. 1709, reported in substance, Abbott, 140.

Raitt v. Mitchell.

This is, indeed, the custom in the river Thames, and of course applies to all ships repaired in the docks in this river. Thus in Raitt *v.* Mitchell. (*n*) In this case, the defendants were shipwrights, and had a dock in the River Thames. The plaintiff having purchased an *East Indiaman* called the Ocean, delivered her to the defendants to be repaired; and she was placed in their dock for that purpose. Nothing whatever passed between the parties with respect to the time or manner in which the repairs were to be paid for, until two months afterwards, when they were completed. The plaintiff having then required that the ship should be delivered back, that she might proceed on her voyage to the *East Indies*, the defendants insisted, that she should not leave their dock till security was given for the repairs, which amounted to about 3000*l.* The plaintiff protesting against the defendant's right to detain the ship, brought this action which was in case, with a count in trover. On the part of the plaintiff it was proved, that by the usage of trade in the River Thames, where there was no express agreement as to the time of payment, the shipwright invariably gave credit for repairs to the owner of the ship repaired; and that the credit varied in different trades. That it was generally fifteen months; and with respect to East India ships, eighteen months; but that, without a previous stipulation for that purpose, neither ready money payment, nor security, was ever required. On the part of the plaintiff, it was contended, that under no circumstances did there exist a lien for ships, even when there was to be a payment in ready money. The defendants, *contrà*, insisted, that it was an established principle, that an artificer had a lien on any chattel upon which he bestowed his labour in the course of his trade; and that there was no reason why this right of lien should not extend to a ship in the dock of a shipwright. It was admitted, that if he did any little job to her whilst lying in the open river, he could not be consi-

Custom as to the repairs of ships in the River Thames.

(*n*) 4 Campb. 146.

Of lien on ships.

dered as having her in his possession; and that, consequently, without the physical power of detention, no lien could exist; but that there appeared to be no real difference between a ship in the dock of a ship carpenter, and a coat in the workshop of a tailor. Lord ELLENBOROUGH, "I am of opinion that, in this case, the defendants had no right to detain the plaintiff's ship. It is distinctly proved that where there is no express stipulation for a ready money payment, credit is invariably given by shipwrights in the River *Thames*. The period of credit varies in the different trades in which ships are employed: but in each trade it appears to be uniform, and for the repairs of an Indiaman, we are told it is eighteen months; at the expiration of which time it is expected they shall have returned from their voyages, and put funds into the hands of their owners by the freight they have earned. This being the invariable usage, I must consider it as the basis of the contract between these parties; and their respective rights and liabilities are precisely the same as if, without any usage, they had entered into a special agreement to the like effect. In that case, it seems to be admitted, that no lien could be claimed. To be sure, a lien is wholly inconsistent with a dealing on credit; and can only subsist where payment is to be made in ready money, or there is a bargain that security shall be given the moment the work is completed. I do not say that a *shipwright has not a lien on a ship in his dock*, where he is to be paid in ready money as soon as the repairs are finished. On the contrary, I am inclined to think that *he has a lien like other artificers*. But there can be no lien without an immediate right of action for the debt, and that does not accrue till the period of credit has expired." A verdict was given for the plaintiff.

Raitt *v.* Mitchell.

Upon a review, therefore, of all these cases, the law of lien, as respects ships, may be briefly comprehended in the three points:—

Of lien on ships.

1. That, in no case whatever, has the master of a ship any lien on the vessel for his wages, or for any money paid by him for necessaries or repairs.

2. That none of those who deal with the ship, whether at home or abroad, for repairs and necessaries, have any lien on the ship, unless a shipwright who shall have the ship in his *actual and entire possession, and shall manually detain it till his debt be paid.*

3. And that even in this latter case, unless the contract be for a ready money payment, or if there be a custom of the port or country, that such repairs shall be a personal credit, and not a lien, such custom takes away the right of lien; and the shipwright must deliver up the ship, though actually in his dock. (*o*)

Power of the master to hypothecate the ship.

Secondly, As to the power of the master to hypothecate the ship, a power which, from the necessity of the case, the master possesses by the maritime code of all commercial countries, and which our own laws have adopted from the earliest period.

(*o*) In the John, Jackson, master, 3 Rob. 288, there was a determination of the Court of Admiralty, which at first view appears to conflict with this doctrine of lien. Some English merchants had supplied an American vessel with stores, &c. for a voyage to the Mediterranean, the ship went and returned to England, and the master being dead, and the owner in America being a bankrupt, was sold in the Admiralty Court in England, under a suit by the seamen for their wages. A surplus remaining after the payment of the wages, the merchants who had supplied the vessel, applied for payment of their demand. The Judge, Sir William Scott, granted it; and added, that upon looking into the cases, he found it had been the practice of the Admiralty Court to allow creditors of this kind to sue against proceeds remaining in the registry, notwithstanding that prohibitions have been obtained on *original suits* instituted by them. That in particular, in the year 1763, he found such a suit was allowed to be prosecuted in the ADVENTURE, CLAP. But it is justly observed by a learned writer upon this case, that there was no person to represent the owner, and object to the application.

As this power of the master amounts almost to a power of the absolute disposal of the ship, the custom of all countries, and of our country amongst them, limits this hypothecation by the master to the circumstance of the vessel being in a *foreign country*, or in the course of her voyage, and not in the place of her owner's residence. But this term place of residence has received a large interpretation by some of the decisions, both in the courts of law and Admiralty. In Menetone *v.* Gibbons, (*p*) where the hypothecation was made in Ireland, Ireland was held to be a foreign country so far as to justify the master in hypothecating the ship. And in the Barbara Chegwin, (*q*) the Admiralty court held, upon the same principles, that Jersey, for the purpose of sustaining hypothecation bonds, might be considered as a foreign possession, to an owner of London. It may be necessary to observe here, that a bond given by the master for money advanced under circumstances of extreme distress, as an hypothecation of the ship and freight, is to be considered in the nature of bottomree. Such bonds have always been held within the jurisdiction of the Admiralty Court, and receive a very favourable consideration. They are, however, considered valid on the ground of necessity only. And, upon the same principle only, a later bond is entitled to a priority of payment over a former. But the same privilege is not to be extended to every species of security which may affect the ship. (*r*) And, with respect to bonds, a priority has been allowed, even when the difference in date was very small, and the bonds were executed at the same place. (*s*) It is usually required as a condition necessary to the validity of an hypothecation bond, that they should be executed in a *foreign port ;* but the law does not look to the mere locality of the transaction. The validity or invalidity of the bond does not rest on that circumstance

Menetone *v.* Gibbons.

Of hypothecation, and bonds in the nature of bottomree.

(*p*) 3 Ter. Rep. 267.

(*q*) 4 Rob. p. 1.

(*r*) Rhadamanthe, Dodson, 204; and the Alexander, 278.

(*s*) Betsey, Dodson, 289.

Of hypothecation, and bonds in the nature of bottomree.

only, but upon the extreme difficulty of communication between the master and his owners; and the master, it is said, will have a right to hypothecate the ship and cargo, though lying in a port of the same country in which the owners reside, provided he has no means of communicating with them. (*t*) But if the master can correspond with the owners, it is not such a case of extreme necessity as to give him the power of hypothecation. The Courts of Admiralty, looking always to the equity of the circumstances in such case, have determined, that it is not an obligation of universal necessity that the master should send to the consignee of the cargo, previous to his giving the bond, and take his directions; nor will they decree such bond to be invalid upon the circumstance of the money having been advanced before the bond be given, if it were the understanding that the money was to be secured by means of bottomree; nor will the high rate of interest affect these bonds, when the casualties and risks to be provided against are very great. (*u*) Such a bond, moreover, is not invalid, for want of a particular description of the voyage; but the master may describe the voyage, *cy pres*, as near as he can. (*w*) We have already said that the master ought not to hypothecate the ship, or to give a bottomree bond, unless in case of necessity. Therefore, when another species of security, entirely personal, as a bill of exchange, was resorted to, at the time, it cannot be said that the master had no personal credit, or other resource for procuring supplies, except on bottomree; and, under these circumstances, Sir William Scott decreed a bottomree bond to be invalid. But it appearing that some part of the money borrowed had reference to a security by bottomree, he permitted the bond to stand for that; for in the Court of Admiralty it is not necessary that a bond should be either good or bad *in toto*. (*x*) But when mo-

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(*t*) The Isabel, Dodson, 273. The court in this case alluded to the ports of Spain, some of which were, at the time, in the possession of a foreign enemy.

(*u*) *Ibid.*

(*w*) Dodson, 463.

(*x*) Augusta, Dod. 283.

Of hypothecation, and bonds in the nature of bottomree.

ney has been well advanced upon such bottomree security, there is nothing inconsistent in taking a collateral security as bills of exchange; nor does such transaction exclude the bond, or diminish its solidity.(*y*) And where the master is well authorized to raise money on such bonds, the party lending is not obliged to look to the application of the money; and though there may be some dishonesty in the master, the merchant, if he does not participate, cannot be affected by it.(*z*) A hired transport in the government service is not incapacitated from being the subject of hypothecation by a bottomree bond; (*a*) and the Court of Admiralty will not reject a claim justly founded, by a minute criticism of the language of the bond, but will look to the substantial justice of the case. Where, therefore, the consignee, upon the direction of the master, appointed another, who was in some degree recognized by the owner, describing him as master, Sir William Scott decided that he was competent to hypothecate the ship, and a bottomree-bond made to secure advances by such consignees was held to be valid. And the warrant of the court will extend to the sails and rigging, though detached and on shore, if so detached only for the purpose of safe custody. (*b*).

A bottomree bond is a negotiable instrument, which may be put in suit by the person to whom it is transferred; and it is almost unnecessary to add, that if the money be not paid within the time conditioned in the hypothecation bond, the ordinary course of practice is, for the agent of the lender to apply to the Court of Admiralty to issue its warrant for the arrest of the ship, and for trial of the demand claimed upon the contract, under which circumstances, if the bond be not satisfied by the parties, the court will decree a sale, and distribute the proceeds according to the justice of the case. (*c*)

(*y*) Jane, Dod. 466.

(*z*) *Ibid.* 465.

(*a*) *Ibid*, 463.

(*b*) Alexander, Dod. 278.

(*c*) 1 Vesey, 443.; and see *post.*

According to the nature of hypothecation, the owners are never personally responsible; but the remedy of the lender is against the master and the ship only. But though it be not the ordinary practice for the master to give a supplementary security upon his owners beyond the hypothecation bond, there appears no good objection against it, so long as the lender does not confound two distinct obligations, by claiming maritime interest upon a security without risk. Therefore in Samson *v.* Bragington, (*d*) where a Jamaica merchant had taken both an hypothecation bond and bills upon the owner for money advanced to refit the ship, and the ship being lost, sued upon his bills of exchange, the Court of Chancery decreed that he should recover the money, but without the maritime interest.

Of the hypothecation of the cargo by the master.

Nor has the master the power to hypothecate the ship and freight only, but in case of necessity, as for example, when the value of the ship is an insufficient security for the amount of the repairs, he may hypothecate ship, freight, and cargo. Thus, in Parmenter *v.* Todhunter, (*e*) a case of capture and re-capture, when money was wanted in the instant to pay the salvage to the re-captors, and the mate procured it by hypothecating the ship and selling a part of the cargo, Lord Ellenborough held, that in the absence of the master he was justified in so doing. But the whole question came before the Court of Admiralty in the case of the Gratitudine, (*f*) upon which occasion it was deliberately decided that the master might hypothecate the cargo as well as the ship. As this is one of the most important cases of late years, and contains a more ample illustration of the law of hypothecation, it deserves the peculiar attention of the reader.

The circumstances of this case were as follows:—The Imperial ship the Gratitudine, bound from Trieste to Lon-

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(*d*) 1 Vesey, 443. (*e*) 1 Campb. 511. (*f*) 3 Rob. 246.

The Gratitudine.

don with a cargo of fruit, suffered so much from tempestuous weather, as to be compelled to go into Lisbon to refit. The master, seeing that the vessel itself was not of value sufficient to pay for the repairs, applied for advice and assistance to one of the Portuguese correspondents of the consignees in England; this Portuguese wrote to the consignee, and received an answer from them, that it belonged to the master exclusively to adopt every necessary measure for the preservation of the cargo; and if it was necessary to unlade, the master alone was to judge of the propriety of such a measure. Accordingly, the master, being in want of money to defray the charges of repairing the vessel and of unlading the cargo, he borrowed the necessary sum on a bottomry bond, binding the ship, cargo, and freight, to pay the said sum within twenty-four hours after her arrival in the port of London. The master, however, refusing to discharge the bond, the holder instituted this suit in the Admiralty against the ship, freight, and cargo, and prayed the court to decree accordingly. The court ordered the bond to be enforced against the cargo as well as the ship. Sir William Scott said, in substance, that the security of the ship not being sufficient, and the master not being able to raise money on that alone, he was necessarily obliged to resort to the cargo; that it could not be said, that the master is in all cases to wait till he hears from a distant country. That the necessity of such a case, therefore, compelled a choice of one two things, *to sell a part of the cargo*, for the purpose of applying the proceeds to the prosecution of the voyage by the repair of the ship; *or to hypothecate the whole*, for the same purpose. With respect to the former, (the sale of a part of the cargo,) the books overflowed with authorities. With respect to the cargo, indeed, the power of selling could not extend to the whole, because it never can be for the benefit of the cargo, that the WHOLE should be sold to repair a ship which is to proceed empty to her destination. But that hypothecation might be of the *whole*, because it may be for the benefit of the whole,

The master may hypothecate the cargo, and sell a part, but he has no authority to sell the whole.

The Gratitudine.

that the whole should be conveyed to its proper market; the presumption being, that this *hypothecation of the whole*, if it affects the cargo at all, will finally operate *to the sale of a part*, and this in the best market, at the place of its destination, and in the hands of its proper consignees. The advocates on the opposite side having suggested that the master might have sent the cargo by another ship, the same learned Judge added, that there were no authorities to bind the master to such transhipment; and that upon all these principles he should decree the hypothecation to be valid.

Jacob, Baer.

The Court of Admiralty, regarding these hypothecation bonds with a peculiar favour, has, upon some occasions, administered justice to them with a very large equity; and in the case of the Jacob, Baer, (*g*) extended the pledge of the freight of a vessel from a particular voyage to a subsequent one. The master had pledged the vessel and freight to a merchant at Baltimore, to be discharged upon the vessel's arrival at Cork. Instead of going to Cork the ship went to Dublin, and the Baltimore merchant did not receive the freight. The ship afterwards sailed to America, and thence to London, where she was arrested and sold, at the suit of the lender. The proceeds not being sufficient to pay the amount lent, and the freight of the last voyage being in the hands of the agent of the owner, the lender applied to the court to have this freight paid over to him. The court, under the peculiar circumstances of the case, granted the prayer of the petition, the Judge observing, that as there were no third persons concerned, but the freight was in the hands of the agents of the owner, he should decide according to the equity of the case. Accordingly, the lender in this case having an hypothecation on the freight to Cork, was paid by the freight from America, no third party, as the Judge observed, being interested, and

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(*g*) 4 Rob. 245.

there being the most manifest justice that the owners should pay what they did not deny that they owed.

Hypothecation does not alter the property of the ship.

As an hypothecation, by the very nature of the contract, is an obligation upon the ship executory only in the case of default of payment, it is manifest that such an hypothecation does not alter the property of the ship, nor transfer it to the lender. The master, therefore, exceeds his authority, if he not only pledge the ship and cargo, but engage to deliver it to any agent of the lender in the first instance. In Johnson *v.* Greaves, (*h*) where the ship was arrested by the Prize Court in Jamaica, and the master, in order to procure her liberty, gave bills of lading of the cargo to one who became bail for the ship and cargo there; it was held by the Court of Common Pleas, that the master had no authority to contract that the cargo should be sold in London, and the proceeds remitted back to Jamaica, the owners being ready to give a sufficient security to indemnify the bail in London.

It is totally unnecessary to add, that the master cannot take up money by hypothecation, except for the necessary repairs, or victualling of the ship, or for forwarding the adventure; and that, in order to prevent any fraud, the law always presumes that the lender advanced the money upon seeing and knowing the necessity of the ship; and under this principle admits the owners to prove, if they can, that there was no such necessity. Upon this evidence, the court will exercise its discretion, whether the money has been fairly advanced for the purposes of the ship, and for the benefits of the owner; or whether there have been a collusive fraud between the master and the lender. But if the necessity, or great and manifest utility to the ship and adventure, be made to appear, or rather if the owners cannot shew the contrary, the owners are bound by the hypothecation, however the master may have misapplied

(*h*) 2 Taunt. 344.

the money. But as the law will not presume fraud, the lender, upon demanding the satisfaction of the bond of hypothecation, is not bound himself to prove this state of the ship's necessity, but the owner must shew the contrary.

We have before observed, that if the master shall have given more than one of these hypothecation bonds at different periods of the voyage, the last is entitled to priority of payment; the principle of which rule is, that the vessel was saved by means of the last. (*i*)

Such, therefore, are the powers of the master to hypothecate, and to give bonds in the nature of bottomree in a foreign port; and such are the limits within which he may exercise it. Upon a review of all the above cases, and others of a similar nature, which we have not deemed it necessary to state, the law and rule of such hypothecation may be summarily comprehended in the three following points:—

First, If a ship be in a state of necessity, and in the course of her voyage, whether she be in a foreign port, or in a port of one British island, (the owners living in another,) or even in a remote port of the same kingdom, the master may hypothecate ship, freight, and cargo for her repairs and necessaries.

Secondly, But two circumstances must always exist in the condition of the ship at the time of hypothecation. 1. The state of necessity of the ship for repairs or victualling. Such a remoteness from the owners as not to admit of awaiting their own advice or act. 2. The impossibility, or difficulty, of obtaining supplies on the personal credit of the master or owners.

(*i*) Dodson 204, and 278. and see *ante*, p. 398, 399.

Thirdly, The law will presume such a remoteness, if the ship be in a foreign port, or in one British island or colony whilst the owners are in another. But in the latter case there must be strong evidence of the extreme necessity of the ship.

Next, As to the power of the master to sell the ship and cargo, or alienate it in part or whole.

The authority of the master to sell the ship or cargo.

It has been before observed, that from a just jealousy of the relation of the master to the vessel, and the facility it would afford him to commit frauds whilst in remote countries, the law will not allow him, except in an extreme necessity, to sell the ship; and we shall here add, that the necessity must be so extreme, that in no case whatever can the ship be safely purchased of the master. Thus in Tremenhere *v.* Tresilian, (*l*) and in Johnson *v.* Shippen. (*m*) Sir Matthew Hale and Lord Holt both decided, that the master had no authority to sell the ship or any part of it, and that his sale would transfer no property. The case before Sir Matthew Hale was, indeed, particularly strong, the sale having been made in a foreign country, in a case of inevitable danger, the ship and tackle being beaten and broken, and no hope of saving any part of them. But all this, Sir Mathew Hale, at that time Chief Baron of the Exchequer, thought, could not warrant the sale of the ship by the master, nor could such a sale convey the property to the buyer. It is stated, indeed, by an English reporter of very early date, that the master may in some cases sell the ship, as in the case of famine. (*n*) It is said, however, by an author of the first authority, that the exception of extreme necessity rather fortifies than weakens the general rule, and that no person can safely purchase a ship of the master in any case which does not clearly fall within the principle upon which the exception is founded; and such a case will rarely happen. And al-

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(*l*) 1 Sid. 452.

(*m*) 2 Lord Raym. 984.

(*n*) Jenk. Cent. 165.

though the master be himself a part owner of the ship, yet will not his sale of the ship be good for more than his own part; for the interest of part owners is so far distinct, that one of them cannot dispose of the share of another; whereas, in articles of ordinary sale, one partner may in general transfer the whole property, if the transaction be without fraud. (*o*)

But this principle, its limits, and the reason upon which it rests, have been so strongly illustrated by some very recent cases, and particularly by Reid *v.* Darby, Hunter *v.* Prinsep and Others, (*p*) and the Fanny and Elmira (*q*) in the Admiralty Court, that a compressed view of these cases will be the best exposition of the law upon the subject.

The case of the Glamorgan.

In Reid *v.* Darby, the Glamorgan, a British ship, having sprung a leak at Tortola, the master applied to the Admiralty Court to order a survey. The court accordingly ordered such survey to be made; and the surveyors gave in their report that the vessel was not seaworthy, nor repairable so as to carry the cargo to its place of destination, but at an expence exceeding the value of the ship when repaired. Upon this report the Vice-Admiralty Court decreed, that the said ship being totally unfit to proceed with her cargo to London, and the repairs being estimated to amount to more than her value when such repairs should be completed, the ship should be sold, and the proceeds paid to the master. The vessel was accordingly sold; and, after a further intermediate voyage from Tortola to Nevis, was sent to London. When this suit was instituted by the owners to recover the ship from the purchasers, two questions were before the Court of King's Bench; the *first*, whether the sale could be sustained under the authority of the Vice-Admiralty Court;

(*o*) Abbott, 3.

(*p*) 10 East. 143, and 378.

(*q*) Edw. 117.

Of the authority of the master to sell ship or cargo.

and, *secondly*, whether it could stand on the authority of the master. The first question was at once determined in the negative; and with respect to the second, Lord Ellenborough expressed his inclination to abide by the rule laid down by Lord Holt in Johnson *v.* Shippen, (*r*) that the master has no authority to sell any part of the ship, and that his sale could transfer no property. The sale, however, was determined to be invalid upon another ground, namely, that the forms of the registry acts had not been complied with.

Hunter *v.* Prinsep.

In Hunter *v.* Prinsep and Others, (*s*) though the substance of the case went upon other circumstances, the same question incidentally arose before the court, and the principle of Reid *v.* Darby was re-affirmed by Lord Ellenborough.

The Fanny and Elmira.

In the Fanny and Elmira, a former owner of an American vessel applied to the Court of Admiralty for the restoration of the ship under the following circumstances. The master stated in an affidavit, that in consequence of damage which the vessel had sustained by getting upon the rocks in Sligo Bay, he deemed it right to cause a survey, which was accordingly made by competent persons, who reported that it would require 1,500*l.* to repair the vessel, a sum far exceeding her value; and that it would be for the interest of the parties concerned to have her sold. That, in consequence of this advice, the ship was advertised for sale, and was accordingly sold, upon which he (the master) executed the bill of sale, and delivered it into the hands of the agent of the purchaser. The purchaser soon afterwards made him an offer of a fourth of the vessel at the price which he had given, provided he would consent to navigate her again as master; to which he acceded. After the vessel was repaired, she proceeded on a voyage to Riga, from whence she was returning to

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(*r*) 2 Lord Raym. 984.

(*s*) 10 East. 143.

the port of London, when she was captured by the Danes, and recaptured by the Hound sloop of war.

Of the authority of the master to sell ship or cargo.

Sir William Scott, in his judgment on this case, which has been justly celebrated, delivered his decree in the following terms:—"This is the sale of a vessel made in Ireland by the master without the authority of his owners; and it is contended that such a sale, being made under the pressure of necessity, will convey a valid title to the purchaser. But, in the first place, it must be shewn that there was a necessity; and then it remains to be considered whether it was such as by law would give the master a right to sell. That such a case may arise, I am not prepared to deny; suppose, for instance, a ship in a foreign country, where there is no correspondent of the owners, and no money to be had on hypothecation to put her into repair. Under these circumstances, what is to be done? The ship may rot before the master can hear from his owners; and, therefore, if the necessity were clearly shewn, with full proof that every thing was done *optimâ fide*, and for the real benefit of the owners, the court might be disposed to sustain a purchase so made. There is a very convenient practice which obtains in the Courts of Vice-Admiralty in the West Indies, where the fact of distress being proved, the transaction is not left to the master, but a sale is ordered under the superintendance of the court itself. The legal validity of such transfers has, however, been contested in the courts of this country; and they were not held to be good; though the learned Lord, who presided in the court where that decision took place, might perhaps incline to consider it as a defect in the law of this country, that a practice so conducive to the public utility could not legally be maintained. In a case of that description, I say, strongly put, where there was no ground for suspicion, although I do not know that such a power is given to the master by the general maritime law; yet, feeling its expediency, this court would strain hard to support the title of the purchaser. But then there must

The Fanny and Elmira.

be the clearest proof of the necessity; it must be shewn not only that the vessel was in want of repair, but likewise that it was impossible to procure the money for that purpose."

Condemnation by a Vice-Admiralty Court not conclusive against the former owner of a ship sold by the master.

A false opinion seems to prevail amongst masters, and those who claim under sales of ships made by them in cases of necessity, that this extreme necessity is sufficiently established, if they procure the order of some Vice-Admiralty Court abroad to have their vessel surveyed, a report of the surveyors that she is not seaworthy, and a consequent sentence of condemnation by the Vice-Admiralty Court. But we have already shewn in Reid *v.* Darby, that the courts of this country will not recognize in the Vice-Admiralty Courts abroad such a power to order the sale of the ship. And in Hayman and Others *v.* Moulton and Others, (*t*) a condemnation of this kind was set aside. The circumstances of this case were peculiar. The plaintiff Hayman, the owner of the ship Grace, brought his action to recover the value of the ship. The ship had been built in 1799; and two years afterwards had been sent on a voyage to Jamaica, where she discharged her cargo, but immediately afterwards encountered a hurricane, and was driven on the shore of that island. The master, under these circumstances, applied to one Cunningham, the consignee of the vessel at Jamaica, for advice how to act; and under his advice made the usual protest of the state of his vessel, and applied for a survey. The deputy naval officer of the island accordingly issued his warrant to four masters of ships, desiring them to examine the Grace, and make a return upon oath of her state and condition. They reported that they had been on board, and found the ship settled in a sand-bank four feet, with a bank of sand between her and the sea of twice her length, and not more than two feet water on the sand-bank; and that they were, therefore, unanimously of opi-

Case of the ship Grace.

(*t*) 5 Esp. N. P. C. 65, and likewise reported in Abbott, p. 7.

nion, from the great expence that would be incurred in attempting to get her afloat, and the little chance of succeeding therein, that it would be most for the advantage of the underwriters, and all others concerned, to sell the ship as she then lay, with all her materials, to the best bidder.

Of the authority of the master to sell ship or cargo.

Cunningham advertised the ship for sale by auction *as a wreck;* he acted as auctioneer, and charged his commission, and she was sold to one Dunn, who sold her to R. Molton, by whom she was sold to the other defendants.

Hayman *v.* Moulton.

The plaintiff contended, that no fair transfer of the property had taken place, the transaction being fraudulent; that Kirby, one of the defendants, had been one of the persons employed in the survey; that the ship had not bilged then, though it was so stated in the survey; but was readily got off, and sailed soon after to England; and performed that voyage in safety; that Cunningham acted as auctioneer; and, without any authority, had undertaken to conduct the sale for the plaintiff; and which sale, with a view to effect a fraudulent transfer, had taken place before the time advertised. This was insisted upon as a strong mark of fraud. Lord Ellenborough, in delivering his opinion to the Jury, said, that a captain of a ship had by law a right to hypothecate her in a foreign country for the purpose of raising money for her necessary repairs; but he had no such general authority by law as to sell. The case of Tremenhere *v.* Tresilian (*u*) had been cited to that effect; and no doubt the law was so: but there were circumstances arising in consequence of the increase in our commercial transactions, that might admit some extension of that rule of law. Where a case of urgent necessity and extraordinary difficulty occurred, where a ship had received irremediable injury, his Lordship said, that the disposition of his mind would be, to

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(*u*) 1 Sid. 452.

In cases of extreme difficulty and urgent necessity, *semble*, that the master may sell the ship for the benefit of the owners.

support the principle that the captain might sell the ship for the benefit of his owner. But such sale could only be justified by extreme necessity, and the most pure good faith; that is, if the vessel were in such a state as to render it probable that the owners themselves would have sold the ship, if upon the spot. His Lordship concluded by saying, that he should leave it to the Jury "whether, in this case, there existed such a necessity as called upon the captain, acting for the benefit of his owners, to sell the ship; and if there did, whether this was a fair sale, or conducted with any fraud? It appears that a survey has been made; but there is no evidence that the captain ever made any attempt to raise the vessel. He should have applied to the agent for the ship, and have endeavoured to procure money for the purpose. If all means of this sort failed, the necessity of selling would have been more pressing; and I think the captain should have done so. With respect to fraud in the sale, I observe in this case much that calls for reprehension: a survey has been made; and some of those who made the survey have become the purchasers. I think such conduct highly improper. A Court of Equity will not allow a trustee to become a purchaser of property of which he is trustee; such jealousy does a Court of Equity entertain of a man's availing himself of information obtained by means of his situation. It would be a useful lesson to persons circumstanced as they are here; they should make their election either to be surveyors or purchasers; but they should not be both, by which they are placed in a situation unfairly to avail themselves of information they have obtained as surveyors." The Jury accordingly found a verdict for the plaintiff. (*x*)

So likewise in the case of Andrews *v.* Glover, (*y*)

(*x*) In the progress of the trial no regard was paid to the authority of the deputy naval officer, who, of course, had no jurisdiction on the subject.

(*y*) Abbott, 9.

Andrews *v.* Glover.

which was an action brought to recover the value of a ship in like manner condemned, and sold at Tobago, as incapable of repair, and in which also the plaintiff succeeded, his Lordship said, that he considered a proceeding of this sort, not as a sentence of a court pronounced for the captors of a captured vessel, but rather as the inquisition of a sheriff, for the purpose of information to those who, under certain circumstances, have the power of selling the ship. Such an inquisition is not conclusive upon the party whose property is in question.

Underwood *v.* Robertson.

In Underwood *v.* Robertson, (*z*) the same question came again before the court, upon an action on a policy of insurance. A ship going from London to Demerara, and insured for that voyage, had been captured by an American privateer near to that island, upon which occasion she was plundered of her stores, and all her crew, except the captain and one boy, taken from her. Being immediately afterwards re-captured, and carried into St. Thomas's, the captain made an instant application to the Vice-Admiralty Court of Tortola, (which is the court of all these islands,) for an order and authority to sell the ship and cargo. The order was accordingly given upon his petition; and the ship and cargo were immediately afterwards sold, and at a loss of 60 per cent. on the cargo. The question before the court was, whether the captain under these circumstances had a right to sell the ship and cargo, and to break up the adventure, so as to entitle the plaintiffs to recover against the underwriters as for a total loss. Lord Ellenborough was of opinion, that the captain *under the circumstances of the case had* no right to sell the ship and cargo. If the captain could not at first have procured a competent crew to navigate the vessel, he should have waited a reasonable time for the purpose: to have enabled him to pay the captor's *eighth*, he was bound to have tried, and to have tried seriously and deliberately,

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(*z*) 4 Campb. 138.

Of the authority of the master to sell ship or cargo.

every other expedient to raise money before disposing of any part of the goods intrusted to his care. It did not satisfactorily appear that he might not have raised the money by drawing on his owners, or by hypothecating the ship. He had come to the conclusion of selling the vessel and cargo in three days. The cargo was only to be resorted to in the last extremity, when every other expedient had failed, and every other resource was hopeless.

Upon a review of all these cases, it appears that the authority of the master or captain to sell the ship or cargo may be summarily stated, and limited, as follows:—

1. That in a case of extreme necessity, and in such case only, can the captain or master resort to the sale of the ship, and in such case he should be provided with the strongest evidences of such necessity, in order to meet and rebut the jealousy and suspicion with which the courts of law always regard such an act of his power.

2. That a survey of the vessel made by the authority of a Vice-Admiralty Court, and a sentence of condemnation by such court consequent upon the report of their surveyors, are not of themselves conclusive evidence, and still less authority, of the extreme necessity of the vessel required by law to justify a sale by the master. Upon which principle Lord Ellenborough, in Andrews *v.* Glover, (*a*) said that he could consider such a proceeding only in the nature of an inquisition by the sheriff, having for its object the information of those who *claimed*, and who under certain circumstances had the power of selling the ship, and was in no degree conclusive upon the owner.

3. That those, therefore, who purchase of the master,

(*a*) Sittings after Trinity Term 46 Geo. III. at Guildhall, Lord Ellenborough, C. J. And see Abbott, 9; and *ante*, p. 413.

Of the authority of the master to sell ship or cargo;

under such circumstances, should be careful to provide themselves, not only with the ordinary titles of a ship, but with the evidences of the state and extreme necessity under which the vessel was sold; and when they became the purchasers. Such evidences are the petition of the master to the court for a survey, a commission of survey, report of surveyors, decree of the Judge adopting the report, petition of the master for a sale, and a commission of sale, directed to the marshal of the court. Nor will all these be sufficient, if there be any thing in the biddings, price, or purchase, which can supply additional matter of suspicion to that jealousy with which the law always regards a transaction of this kind.

Such, therefore, is the rule of law as regards the sale of the ship by the master. (*b*) As the value of the ship and freight, from the extent of injury which the vessel may sustain, may sometimes be deemed an insufficient security for the amount of the expences of the repairs, the master, as we have already shewn, may hypothecate the cargo for the repairs of the ship when in distress in a foreign port, and even sell a part, in order to enable him to convey the residue to its destination. It should seem, however, that he cannot, under any circumstances, sell the whole of the cargo. But as to the general doctrine. and the power of the master to hypothecate, or to sell a portion of the cargo for the repairs of the ship in a remote country, the reader is again referred to the celebrated judgment of Sir William Scott in the case of the Gratitudine. (*c*)

(*b*) Some early cases of hypothecation, and some incidental observations by the court upon the power of the disposal of the ship by the master, may be found as follows. Bridgman's case, 12 J. 1. Hob. 11. Moore, 918. 1 Ro. Abr. 530. Scarborough *v.* Lyrus, 3 Car. 1. Latch. 252. Noy. 95. Corset *v.* Husely. 1 W. & M. Comb. 135. Rep. Ter. Holt, 48 and Benzen *v.* Jeffries, 8 & 9 Will. 3. 1 Lord Raym. 152 Lister *v.* Baxter, 1 Stra. 695. Menetone *v.* Gibbons, 3 T. R. 267.

(*c*) 3 Rob. 240. and see *ante*, p. 402.

The master is *de jure* the agent of the owner of the ship; but he is not, unless specially constituted, the agent of the owner; but a carrier merely.

The master, as we have before observed, is *de jure* the agent of the owner of the vessel, who is, therefore, bound by his acts as to all consequences resulting from the conduct of the ship. But he has no such extensive relation as to the owner of the cargo; being in that case only a carrier, unless specially constituted an agent. (*d*) Unless, therefore, in the case of extreme necessity, which requires the sacrifice or hypothecation, in part or whole, of the cargo as well as the ship, no act of the master can affect the owner of the cargo. (*e*) As he can only act for the presumed benefit of the owner, and as it can scarcely ever be for the advantage or profit of the owner that the whole cargo should be sacrificed, he cannot, of course, dispose of the *whole* by sale. It is doubtful even, whether he can act to that extent which, in cases of similar circumstances, but of a less valuable trust, the law would allow to an agent or servant, as being the presumable will of his master under the exigent circumstances of the case. Hence, though under an extreme case of difficulty or danger, it would be a reasonable presumption, that the owner himself, if present, would direct a sale of the cargo, it is held to be still doubtful, in the courts of common law, whether a master should be entrusted with a power so open to abuse.

Campbell *v.* Thompson.

In Campbell *v.* Thompson (*f*) it appeared that the plaintiff had shipped goods on board a vessel, which, by stress of weather, had been driven into the port of Halifax. Part of these goods, without any urgent necessity, had been sold there by the captain, in order to defray the expences of repairing the ship. Whilst the vessel was engaged in this voyage, Metcalfe, the owner, made an assignment of the freight to the defendant. On the ship's arrival in the port of London, the defendant refused to deliver to the plaintiff the residue of his goods, unless he

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(*d*) 1 Rob. 84. 151. and 156.

(*e*) 2 Rob. 251.

(*f*) 1 Starkie, 490.

paid freight for the whole. The plaintiff insisting that he had a right to set off the sum for which the goods had been sold against the demand for freight, an agreement was mutually entered into, by which the plaintiff agreed to pay the freight of the goods, when it should become due, and agreed also to accept a bill for the amount; the defendant engaging to indemnify the plaintiff, in case it should appear, between that time and the time when freight should become due, that the plaintiff had any claim for deduction. The action was founded upon a breach of this undertaking. It was contended, on behalf of the defendant, that the captain had a right to sell a part of the cargo for the purpose of repairs; but Lord ELLENBOROUGH, addressing himself to this part of the case, said, "I desire that it may not go abroad that the master, as has been contended, has any right to dispose of goods on board the ship, except, indeed, in cases of urgent necessity. There is a paucity of authorities on this subject, but this has been so decided in a case which was tried before Lord C. J. EYRE. His Lordship refused to reserve the point, adding, "that to save the question would imply that he entertained doubts upon it."(*g*)

Of Bottomry and Respondentia.

Having already spoken at length of the master's power of hypothecating the ship in a foreign port, it remains that we should add a few remarks upon bottomry and respondentia.

The contract of bottomry and respondentia seems to deduce its origin from this necessary authority of the master; and, although this contract has been the subject of very learned investigation in several treatises on the law of maritime insurance, it must not altogether be omitted in the present place. But, previous to this enquiry, it will

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(*g*) A new trial was afterwards moved for in the K. B. and refused by the court.—See likewise *ante*, the case of the Gratitudine, 3 Rob 240.

No settled form of bonds or contracts of hypothecation

be necessary to say a few words on the *form* of the instrument of hypothecation. When the master hypothecates the ship abroad, there is no settled form of contract in use on these occasions; sometimes an instrument in the form of a bond, (thence popularly called a bottomree bond,) at other times a bill of sale; at others, instruments of a different kind, are employed to hypothecate the vessel. But, whatever the nature of the instrument be, it ought to express the occasion of borrowing, (for example, to repair the ship, to pay customs, duties, &c.) the sum, the premium, the ship, the names of the parties, the voyage, the risks to be borne by the lender, and the subjection of the ship itself as security for the payment of the monies advanced. We have already observed, that this security being *in re*, the lender, by the universal maritime law of Europe, has a right to have recourse to the ship itself for repayment. Upon the arrival, therefore, of the vessel in her home port, if default be made in payment of the money borrowed, the lender may obtain a warrant from the Court of Admiralty to arrest the ship, upon an affidavit of the facts, and may cite all persons interested to appear before the court. This citation is generally made by posting a copy of the warrant upon some part of the ship. (*h*) The Court of Admiralty may decree a sale of the ship, and distribute the proceeds to the different claimants; and the absence and default of the owners will be no impediment to the proceedings of this court; for if it were admitted that no decree could be made unless they should appear, a failure of justice would frequently occur. This proceeding *in rem* against the ship itself is the proper and peculiar province of the Court of Admiralty. The courts of law have no such power; their proceedings are entirely personal, and they have no authority to adjudge a delivery of the ship in *specie*.

Summary jurisdiction of the Court of Admiralty.

With regard, however, to contracts of bottomry, *pro-*

(*h*) Abbott, 151.

perly so called, made by the owners themselves in this country before the beginning of a voyage, by the terms of which the ship is pledged as a security, it should be observed, that the lender has not the same convenient and prompt remedy by suit in the Admiralty against the ship, as he has in the case of hypothecation for necessaries by the master in a foreign port.(*i*) And if the contract relate to a British ship, and there be an assignment by way of security, either to take place by some instrument *in presenti*, or *in futuro*, it should seem that it would be necessary for the lender to comply with the forms of the registry acts, in order to make the contract available either in equity or law.

Of bottomry and respondentia.

A few words will, therefore, be necessary to explain the nature of bottomry and respondentia, which must not be confounded with the contract of hypothecation which the master makes in a foreign port.

Of the nature of the contract of bottomry and respondentia.

The contract of bottomry is in the nature of a mortgage of a ship, when the owner of it borrows money to enable him to carry on the voyage, and pledges the keel or *bottom* of the ship, as a security for the repayment: and it is understood, that if the ship be lost, the lender also loses his whole money; but if it return in safety, then he shall receive back his principal, and also the premium or interest stipulated to be paid, however it may exceed the usual or legal rate of interest. When the ship and tackle are brought home, they are liable, as well as the person of the borrower, for the money lent. (*k*) But when the loan is not made upon the vessel, but upon the goods and merchandizes laden therein, which, from their nature, must be sold or exchanged in the course of the voyage, then the borrower only is *personally* bound to answer the contract; who, therefore, in this case is said to take up

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(*i*) Abbott, 146.

(*k*) 2 Black. 457, and Park on Insur. 615.

Of bottomry and respondentia.

money at *respondentia.* In this consists the difference between *bottomry* and *respondentia;* that the one is a loan upon the ship, the other upon the goods; in the former, the ship and tackle are liable, as well as the person of the borrower; in the latter, for the most part, recourse must be had to the person only of the borrower. Another distinction is, that in a loan upon bottomry the lender runs no risk, though the goods should be lost; and upon respondentia the lender must be paid his principal and interest, though the ship perish, provided the goods are safe. But in all other respects the contract of bottomry and respondentia is upon the same footing; and the rules and decisions applicable to one are applicable to both. (*l*)

In what circumstances contracts of bottomry and respondentia are distinguished.

These terms are also applied to another species of contract, which does not exactly fall within the description of either; namely, to a contract for the repayment of money, not upon the ship and goods only, but upon the mere hazard of the voyage itself; as if a man lend 1000*l.* to a merchant to be employed in a beneficial trade, with a condition to be repaid with extraordinary interest, in case a specific voyage named in the condition shall be safely performed; which agreement is sometimes called *fœnus nauticum*, or *usura maritima.* But as this species of bottomry opened a door to gaming and usurious contracts, especially in long voyages, the legislature, at the time it suppressed insurances upon wagering policies, introduced a clause, by which it was enacted, "That all sums of money lent on bottomry, or at respondentia, upon any ship or ships belonging to his majesty's subjects, *bound to or from the East Indies*, should be lent only on the ship, or on the merchandize or effects, laden or to be laden, on board of such ship, and should be so expressed in the condition of the said bond; and the benefit of salvage should be allowed to the lender, his agents or assigns, who alone shall have a right to make assurance on the money so lent; and no borrower of money on bottomry, or at respondentia,

Molloy, lib. 2. c. 11.

19 Geo. II. c. 37. s. 5.

(*l*) Park. on Insur. 616.

Of bottomry and respondentia.

shall recover more on any insurance than the value of his interest in the ship, or in the merchandizes and effects laden on board thereof, exclusive of the money so borrowed; and in case it should appear that the value of his share in the ship or in the merchandizes or effects laden on board of such ship, did not amount to the full sum or sums he had borrowed as aforesaid, such borrower should be responsible to the lender for so much of the money borrowed, as he had not laid out on the ship or merchandizes laden thereon, with lawful interest for the same, in the proportion the money not laid out should bear to the whole money lent, notwithstanding the ship and merchandizes should be totally lost."

This statute has entirely put an end to that species of contract which was last mentioned, namely, a loan upon the mere voyage itself, as far, at least, as relates to *East India* voyages; but as none other is mentioned, and as *expressio unius est exclusio alterius*, these loans may be made in all other cases, as at the common law, except in the following instance, which is another statutory prohibition. The statute 7 Geo. I. c. 21. declares, that all contracts made or entered into by any of his majesty's subjects, or any persons in trust for them, for or upon the loan of any monies by way of bottomry, or any ship or ships in the service of foreigners, and bound or designed to trade in the *East Indies or parts aforesaid*, shall be null and void. (*m*)

This act, it should seem, does not extend to prevent the king's subjects from lending money on bottomry on foreign ships trading from their own country to their settlements in the *East Indies*. The purpose of the statute was only to prevent the people of this country from trading to the *British* settlements in *India* under foreign commissions, and to encourage the lawful trade to those settlements.

(*m*) 7 Geo. I. c. 21. s. 2. Park on Insur. 617.

Of bottomry and respondentia.

The principle on which bottomry is allowed is, the convenience of trade, and the risk which the lender incurs of losing his principal and interest. It is, therefore, of the essence of this contract that the lender should incur the risk of the voyage; and that both principal and interest be put to hazard; for if the risk only extend to the interest or premium, and not to the principal, it is a contract against the statute of usury, and therein void. The cases, which are numerous on this subject, are all uniform in the rule, that, on account of the risk, the interest reserved may exceed the common rate. But as the hazard to be run is the very basis and foundation of this contract, it follows that, if the risk be not run, the lender cannot be entitled to the extraordinary premium.

The amount of the loan on bottomry or respondentia, as before observed, is not restrained by any fixed regulations of the law of this country, although many maritime states have express ordinances on this subject. (*n*) The only restriction in the law of England is upon money lent on ships and goods going to the East Indies, which must not exceed the value of the property on which the loan is made. (*o*) With respect to the risks to which the lender undertakes to expose himself, they are for the most part mentioned in the condition of the bond, and are nearly the same against which the underwriter, in a policy of insurance, undertakes to indemnify the assured. These risks are sea perils, tempests, pirates, fire, capture, and all other misfortunes, except such as arise from the defects of the vessel, as from its being not seaworthy, &c.; or from the misconduct of the borrower. Bottomry bonds generally express from what time the risk is to commence, as that the ship shall sail from London to a certain port abroad. (*p*) In such cases, the contingency does not commence till the ship departs;

Of the risks to which the lender on bottomry is liable.

(*n*) Park 627.

(*o*) 19 Geo. II. c. 37.

(*p*) Park 626.

Of bottomry and respondentia.

and, therefore, if she receive an injury before the inception of the voyage, it will be the loss of the borrower: but if the condition be, "that if the ship shall not arrive at such a place by a certain time, then," &c.; in these instances, the risk commences from the time of sailing; and a different rule as to the loss will necessarily prevail. (*q*) The lender on bottomry, as we have said, is answerable for losses by capture; or, to speak more accurately, if a loss by capture happen, he cannot recover against the borrower; but, in bottomry and respondentia bonds, capture does not mean a mere temporary taking, but it must be such a capture as to occasion a total loss; and, therefore, if a ship be taken and detained a short time, and yet arrive at the port of her destination within the time limited, (if time be mentioned in the condition,) the bond is not forfeited, and the obligee may recover. (*r*) So likewise it has been determined, that an assured in bottomry cannot recover against the underwriter, unless there has been an *actual* and *total* destruction of the ship; for if the ship exist in *specie* in the hands of the owner, though under circumstances which would justify an abandonment in a common case, it will not be deemed a total loss within the meaning of a bottomry bond. (*s*) A lender on bottomry or respondentia is to be distinguished in many things from an ordinary insurer. He is not entitled to the benefit of salvage, nor is he liable to contribute in the case of general average. (*t*) "By the law of England," says Lord Kenyon, "a lender upon respondentia is not liable to average losses; but is entitled to receive the whole sum advanced, provided ship and cargo arrive at the port of destination." (*u*) We have already said, that if the loss of the ship happen by the default of the borrower, or

Of the meaning of the term *capture* in bottomry bonds.

(*q*) Park 626.

(*r*) *Ibid.* 627; and see the case of Joyce *v.* Williamson, there cited.

(*s*) Thompson *v.* Royal Exch. Assurance Company, 1 Maule and Selw. 30.

(*t*) Joyce *v.* Williamson, Park 627.

(*u*) Walpole *v.* Ewer, Park. 629. and Power *v.* Whitmore, 4 Maule and Selw. 141.

Of bottomry and respondentia.

of the captain, the lender is not liable, and has a right to demand the payment of the bond. If, therefore, the vessel be lost by a wilful deviation from the track of the voyage, the event has not happened upon which the borrower was to be discharged from his obligation. This has been decided in several cases. (*x*)

There is no restriction by the law of England as to the persons to whom money may be lent on bottomry, or at respondentia; but as it frequently happened, as appears by the preamble to the 19 Geo. II. c. 32. that the borrowers on bottomry or at respondentia became bankrupts after the loan of the money, and before the event happened which entitled the lender to repayment, by which means the debt could not be proved under the commission, and the lenders were left to such redress as they could obtain from the bankrupt, who had previously given up every thing to his other creditors; and this proving a discouragement to trade, it was enacted in aid of such contracts,

19 Geo. II. c. 32.

"That the obligee in any bottomry or respondentia bond, made and entered into upon a good and valuable consideration, *bonâ fide*, should be admitted to claim, and *after the contingency should have happened, to prove his or her debt or demands in respect of such bond, in like manner as if the contingency had happened before the time of the issuing of the commission of bankruptcy against such obligor*, and should be entitled unto, and should have and receive a proportionable part, share, and dividend of such bankrupt's estate, in proportion to the other creditors of such bankrupt, in like manner as if such contingency had happened before such commission issued; and that all and every person or persons, against whom any commission of bankruptcy should be awarded, should be discharged of and from the debt or debts owing by him, her, or them, on every such bond as aforesaid, and should have the benefit of the several statutes now in force against bank-

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(*x*) Park. 631. where the cases are collected.

Of bottomry and respondentia.

rupts, in like manner, to all intents and purposes, as if such contingency had happened, and the money due in respect thereof had become payable before the time of the issuing of such commission."

16 Car. I. c. 6. s. 12. and 22, 23 Car. II. c. 11. s. 12.

By the statute book it appears, that the masters and mariners of ships having taken upon bottomry greater sums of money than the value of their adventure had been accustomed wilfully to cast away, burn, or otherwise destroy the ships under their charge, to the great loss of the merchants and owners; it was therefore enacted, "That if any captain, master, mariner, or other officer belonging to any ship, should wilfully cast away, burn, or otherwise destroy the ship unto which he belonged, or procure the same to be done, he should suffer death as a felon." The duration of the first act having been limited to three years, it became extinct; but the necessity of such a provision was so great, that a similar law was made a few years afterwards, and is still in force.

Utility of the contract of bottomry and respondentia.

The contract of bottomry and respondentia is of great utility in a country where the persons engaged in trade have not a sufficient capital to carry on their foreign commerce, by inducing speculative men to embark their money in such ventures; and thus is formed a sort of partnership between the lender and the borrower, in which the one supplies capital, and the other skill and experience; the one takes upon himself the perils of the sea, and the other compensates him by a share of the profits of the adventure. But, except in this respect, this contract has no resemblance to a regular partnership, having in it no community of capital, or community of loss. (*y*)

Formerly the practice of borrowing money on bottomry and respondentia was more general in this country than

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(*y*) Sav. Dict. h. t. Casaregis disc. 7, n. 2; Emerig, t. 2. p. 394. and Marshall 738.

Rarely resorted to in Great Britain.

at present. The extensive capitals now engaged in every branch of commerce render such loans unnecessary; and money is now seldom borrowed in this manner, but by the masters of foreign ships who put into our ports, and are in want of pecuniary assistance to refit, to pay their men, to purchase provisions, &c. Sometimes officers and others belonging to ships engaged in long voyages, who have the liberty of trading to a certain extent, with the prospect of great profit, but without capitals of their own to employ in an adventure, take up money on respondentia to make their investments: but even this practice has ceased to be frequent. (z)

Form of the contract.

This contract, which must always be in writing, is sometimes made in the form of a deed-poll, called a bill of bottomry, executed by the borrowers, sometimes in the form of a bond or obligation, with a penalty. But whatever may be its form, it must contain the names of the lender and the borrower, those of the ship and the master; the sum lent, with the stipulated marine interest; and the voyage proposed, with the duration of the risk which the lender is to incur. It must shew whether the money be lent on the ship, or on goods on board, or on both; and every other stipulation and agreement which the parties may think proper to introduce into the contract.

The marine interest should be expressly reserved. *Semble,* that courts of law and equity will not supply omissions in this respect.

It is essential to this contract that the marine interest be expressly reserved in it. Some foreign writers, indeed, hold, and it appears to us very justly, that, without this, the law would look upon the contract only as a simple loan, upon which the lender had gratuitously taken upon himself the perils of the sea. Emerigon, however, thinks (*a*) that this being a contract founded in good faith, equity will supply the omissions occasioned by mistake or inadvertence. But we apprehend, that in the case of marine interest not being expressly stipulated for in the contract, the law of England would in no case supply the omission, neither by a large and general interpretation of the nature of the contract, nor by admitting proof of the usage of merchants. The equity of English courts is not that loose general reasoning which foreign writers see in practice in their own. It is, with us, always under the controul of precedents, adjudged cases, and of the long known and established practice of the courts; and there is no safer principle in the English law, than that written contracts should be deemed to contain the *whole* of the will of the parties, and that nothing should be added to them, or taken from them, unless in cases of manifest error or omission. What is ambiguous may, indeed, be explained by evidence out of the contract; but no new obligations must be inferred or *reasoned* out by a commentary on the contract itself.

(z) Marsh. 738.

(*a*) Tit. 2. p. 406.

CHAPTER IV.

OF THE MARINERS.

Of the duties of mariners.

HAVING treated in a former chapter of the owners, part owners, and the masters of ships, we now proceed to the mariners, under which head we shall consider, *first*, Their general duties; and, *secondly*, (but which, from its importance, will be the subject of a chapter by itself,) what respects their wages.

In order to regulate the duties of mariners, the legislature has from time to time passed several acts of parliament, the principal of which are the 2 Geo. II. c. 36. and 31 Geo. III. c. 39. Upon a review of these statutes, the duties of mariners as required by law, and of masters in hiring them, may be stated as follows:—

Contract with seamen must be in writing, and signed by the master and seamen.

The first rule is, that the contract for service must be made with the master, by a written agreement, signed by him and the mariners; such agreement to express their wages, and the voyage for which they are hired. The contract thus signed becomes the articles by which the seamen are bound to the master; and if a mariner, after having signed them, either refuses to proceed on the voyage, or deserts in the course of it, he forfeits to the owner all wages then due to him; and a Justice of the Peace may, on complaint of the master, owner, or person having charge of the ship, issue a warrant to apprehend him; and in case he refuses to proceed on the voyage, and does not assign a sufficient reason for his refusal, may commit him to hard labour in the house of correction, for not more than *thirty*, nor less than *fourteen* days. Any absence from the ship without permission of the master, or other person acting in command, is punishable by the forfeiture of two days' pay to Greenwich Hospital for every such day's absence. And whether the ship be upon a coasting or foreign voyage, if any seaman leave her without a written discharge from the master, or any person acting in authority for him, such seaman is to forfeit one month's wages to the chest at Greenwich. In a foreign voyage, the penalty attaches, if the mariner leave the ship at her port of delivery here, without such written discharge; and in a coasting voyage, if he leave her before the voyage is completed, and the cargo delivered. Seamen, however, entering on board any of his majesty's ships, are exempted from these provisions. (*a*)

Articles of agreement between master and mariners, justify reasonable correction.

These articles of agreement between master and mariners always contain an express clause, that every lawful command which the master shall think necessary to issue for the effectual government of the vessel, and for suppressing immorality and vice of all kinds, be strictly obeyed, under the penalty of the person disobeying forfeiting his whole wages or hire, together with every thing belonging to him on board the vessel. Under this clause, added to the manifest necessity of the case, it is adjudged that the master may exercise over his crew the authority of a master over his apprentices, and may give them reasonable and salutary correction; the law considering such correction to be a less punishment than the total forfeiture of wages stipulated by the articles. But on the other hand, the law having a due regard to the liberty of the subject, and to the different degree of the public interest concerned in the merchant and king's services, regards this exertion of authority with the greatest jealousy, and most strictly confines it within those limits, which are necessary to the safety of the ship, and the due progress of the voyage. Accordingly in all cases, a sea-

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(*a*) 2 Geo. II. c. 36. s. 13.; and 31 Geo. III. c. 39. s. 4.

man, who has been beaten or imprisoned by the master, may, upon his return to a British port, bring an action against him, to which the master must plead specially that the seaman had committed some particular fault, (specifying such fault,) and that he had corrected him only moderately for it. In Watson *v.* Christie, (*b*) it appeared that the defendant was the captain of a ship, and the plaintiff one of his crew; that the plaintiff, whilst under the defendant's command, had been so severely beaten by order of the defendant, that he had ever since that time been in a state of extreme ill health, and was likely to continue so during the rest of his life, which was still in some danger in consequence of the assault. On the other hand, it was offered to be proved, that the beating in question was given by way of punishment for misbehaviour on board the ship; and it was insisted that, as the conduct of the defendant, at the time of the assault, was necessarily in evidence, such conduct proved misbehaviour, and justified the assault. Lord Eldon, Chief Justice, said, that although the beating in question, however severe, might possibly be justified on the ground of the necessity of maintaining discipline on board the ship, yet that such a defence could not be resorted to unless put upon the record in the shape of a special justification.

Watson *v.* Christie.

Self-defence a justification for homicide in suppressing a mutiny.

Should any mutiny occur on board a merchant vessel, the captain may resort to every necessary means of self-defence, and of subduing his crew. Should any seaman be killed or wounded in the course of such conflict, it is regarded in law as an act of self-defence. But though the captain may confine or put in irons a mutinous seaman, whether for the purpose of preventing the effects of his mutiny, or for bringing him to trial in England, he must not punish beyond reasonable correction, that is to say, he must not punish in the nature of a penal satisfaction at law. By the 39 Geo. III. c. 37., all offences on the high

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(*b*) 2 Bos, and Pull. 224.

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seas may be tried under the Admiralty commission, and punished as if committed on shore. And by the 43 Geo. III. c. 160. s. 78., all justices of the peace may receive information of murder, piracy, or robbery on the sea, and commit the offenders for trial.

Three offences against ship and cargo; *i. e.* the destroying the ship, the running away with the ship, and voluntarily yielding it up to pirates and enemies.

With respect to offences committed by mariners against the ship and cargo, they are of three kinds; namely, the offence of wilfully destroying the ship, of running away with the ship or cargo, or exciting a mutiny, and of not resisting pirates or enemies.

Destroying ships a capital felony by 43 Geo. III. c. 113.

The first offence, that of destroying the ship, having originated in the temptation afforded by the practice of insuring, was very early made felony by several successive acts of Charles, Anne, and George the First; (*c*) but the verbal description of the offence in these acts having been found insufficient in the case of Easterby *v.* Macfarlane, (*d*) they were all repealed, and the statute of 43 Geo. 3. c. 113. passed in their place. By this statute it is enacted, "That if any person or persons shall, from and after the 16th day of July, 1803, wilfully cast away, burn, or otherwise destroy, any ship, or vessel, or in anywise counsel, direct, or procure the same to be done, and the same be accordingly done, with intent or design thereby wilfully and maliciously to prejudice any owner or owners of such ship or vessel, or any owner or owners of any goods loaden on board the same, or any person or persons, body politic or corporate, that hath or have underwritten or shall underwrite any policy or policies of insurance upon such ship or vessel, or on the freight thereof, or upon any goods loaden on board the same, the person or persons offending therein being thereof lawfully convicted, shall be deemed and adjudged a principal felon or felons, and

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(*c*) 22 & 23 Car. II. c. 11. s. 12; 1 Ann. stat. 2. c. 9. s. 4.; 4 Geo. I. c. 12. s. 3.; 11 Geo. I. c. 29. s. 5, 6 & 7. And see *ante*, p. 425.

(*d*) East. P. C. Addenda, p. 26.

43 Geo. III. c. 113. shall suffer death, as in cases of felony, without benefit of clergy." It is further enacted by the second section, "That if any ship or vessel shall, from and after the 16th day of July, in the year of our Lord 1803, be wilfully cast away, burnt, or otherwise destroyed, within the body of any county of this realm, that then the said several offences, as well in wilfully casting away, burning, or otherwise destroying such ship or vessel, as in counselling, directing, or procuring the same to be done as aforesaid, shall and may be respectively enquired of, tried, determined, and adjudged in the same courts, and in such manner and form, as felonies done within the body of any county, by the laws of this realm now are to be, or by virtue of this act hereafter may be, inquired of, tried, determined, and adjudged; and if any such ship or vessel shall be wilfully cast away, burnt, or otherwise destroyed on the high seas, then that the said several offences, as well in wilfully casting away, burning, or otherwise destroying any such ship or vessel, as in counselling, directing, and procuring the same to be done as aforesaid, shall and may be respectively enquired of, tried, determined, and adjudged, before such court, and in such manner and form as in and by an act made in the 28th year of the reign of King Henry VIII., instituted *for pirates*, is appointed and directed for the enquiring, trying, determining, and adjudging of felonies upon the high seas."

43 Geo. II. c. 113. "And whereas it is convenient that accessories to felonies committed within the body of any county within the realm, should be by law liable to be tried, as well in the county wherein the principal felony was committed, as in the county in which they so became accessories, and also that accessories to felonies committed upon the high seas should be by law liable to be tried by such court, and in such manner as by the act made in the 28th year of the reign of the late King Henry the 8th is directed in respect to felonies done upon the high seas;" it is further enacted, "that from and after the said 16th day of July,

in the said year of our Lord, 1803, in all cases whatsoever in which any person or persons shall hereafter procure, direct, counsel, or command any other person or persons to commit, or shall abet any other person or persons in committing any felony whatsoever, or shall in any wise whatsoever become an accessory or accessories before the fact to any felony whatsoever, whether such principal felony be committed within the body of any county within this realm, or upon the high seas, and whether such procuring, directing, counselling, commanding, and abetting, or otherwise becoming accessory or accessories before the fact shall have been committed or done within the body of any county within this realm, or upon the high seas, that then, and in all such cases, the offence of the person or persons so procuring, directing, counselling, commanding or abetting such felony, or so in any wise becoming accessory or accessories before the fact to such felony, shall and may be inquired of, tried, determined, and adjudged, in case such principal felony shall have been committed within the body of any county within this realm, by the course of the common law, either within such county wherein the said principal felony shall have been committed, or within the county wherein the said offence in procuring, counselling, commanding, and abetting, or otherwise becoming accessory or accessories before the fact shall have been committed or done; and in case the said principal felony shall have been committed upon the high seas, then the said offence in procuring, directing, counselling, commanding, or abetting, such felony, or of so becoming an accessory or accessories before the fact to the same, shall and may be inquired of, in and by such court, and in such manner and form, as in and by the said act made in the 28th year of the reign of King Henry VIII., is appointed and directed for the trying, determining, and adjudging of felonies done upon the the high seas." The act, however, contains a provision that if an offender be tried by one jurisdiction, he shall not be again tried by another.

43 Geo. III. c. 113.

43 Geo. III. c. 113.

Running away with ship or cargo, and making a revolt in *the* ship.

The second offence, that of running away with the ship or cargo, or creating a mutiny, is likewise a capital felony. It is so made by an act of William III., and a further statute of George I. (*e*) which enacts, in substance, that if any master or seaman shall betray his trust, and turn pirate, and feloniously run away with a ship or merchandize, or shall voluntarily yield his vessel up to any pirate, or shall lay hands upon his captain, to prevent him from fighting in his defence, or shall confine his captain, and endeavour to make a revolt in the ship, he shall be deemed a pirate, felon, and robber, without benefit of clergy.

Not resisting pirates or enemies.

The third offence, that of not resisting enemies or pirates, is punished by an act of Charles II., (*f*) which incapacitates any master from having the future charge of any English vessel, who shall not have defended his vessel from pirates, such vessel being not less than 200 tons, nor furnished with less than 16 guns. The same act forbids him to yield, without fighting, to any Turkish pirate, not having double his guns. The seamen, who shall refuse to fight, are punished by the same act with the loss of their wages, their own goods on board the ship, and with an imprisonment and hard labour for a space not exceeding six months.

Encouragement to seamen.

In order to encourage seamen to discharge their duty upon the occasion of ships being attacked by enemies or pirates, the legislature has passed several acts, and created or enlarged several institutions, by which a provision is made for merchant seamen wounded or disabled in such conflicts, and for the widows and children of such as shall have been killed. By two of these acts, one of King William, and one of King Charles, (*g*) it is enacted

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(*e*) 11 and 12 Will. III. c. 7. and 6 Geo. I. c. 19.

(*f*) 16 Car. II. c. 6., and 22 and 23 Car. II. c. 11. s. 10.

(*g*) 11 and 12 Will. III. c. 7. s. 11. 22 and 23 Car. II. c. 11. s. 10.

that when any English vessel, which shall have been so defended against pirates or enemies, and in which conflict some of her crew have been disabled or wounded, shall arrive in port, the Judge of the Admiralty, mayor, or other principal magistrate, shall summons four of the chief merchants of the town, and by their advice shall levy upon the owners of the ship and goods a reasonable compensation to the captain and crew for such defence; but such sum not to exceed 2 *per cent.* on the value of the ship, freight, and cargo.

Institutions by act of parliament for the relief of disabled and worn out seamen and their families.

These provisions for encouraging merchant seamen in the performance of their duty, and for relieving and supporting such of them as shall be maimed and disabled; and for supporting the widows and children of such as shall be killed or wounded in the merchant service, have been further extended by three more recent statutes; (*h*) the two first of which enact, that such seamen shall be admitted into and provided for in Greenwich Hospital.—The last statute (*i*) provides another establishment, and a permanent corporation for the more ample accomplishment of the same object. The enactments of these statutes, stated in a summary manner, are, that every merchant seaman, except only apprentices, fishermen employed in boats and coasters, pilots, and seamen employed by the East India Company, shall pay sixpence a month out of their wages to this corporation, to be deducted by the master, and by him paid over to the charity. That a corporation of merchants, who are named in the act, shall be the managers of the charity, and may purchase land, erect an hospital, and give pensions to all merchant seamen rendered incapable of service by sickness, wounds, or other accidental misfortunes, and may relieve the widows and children of such as are killed or drowned in the merchant service; such children, however, not to exceed the age of

(*h*) 8 Geo. I. c. 24. 8 Geo. II. c. 29. s. 10. 20 Geo. II. c. 38.

(*i*) 20 Geo. II. c. 38.

fourteen years, unless rendered objects of charity by blindness, lameness, or other infirmity. Nor is any one to be deemed a worn out seaman, who shall not have been five years in the merchant service, and paid the contribution. The master is required always to keep a muster roll of his crew, and to deliver a duplicate of it before sailing to the collector of this contribution at the port from which he is about to sail. The master must likewise keep an account or report of all casualties to any of the crew during the voyage; and, upon his return, must give a duplicate to the collector.

Provisions for the subsistence and sending home of seamen cast away in foreign parts.

There are other statutes for the relief of shipwrecked or abandoned seamen, (*k*) by which his majesty's ministers or consuls abroad, or, if no official character be there resident, two or more British merchants, are commanded to give subsistence to any cast away seaman in foreign parts, at the rate of sixpence a day, and to send them home with the first opportunity by some one of his majesty's ships, or British merchant ships, sailing for England: every master of a British ship to receive, in case of need, four such cast away seamen for every hundred ton burthen of his ship, and to be paid sixpence per diem by the commissioners of the navy, for so many of them as he did not require to aid him in working his vessel. And if any master wilfully leave behind any of his crew, in any foreign part or distant British plantation, such men being in a condition to return with the ship at the time of her departure homewards, the master so offending is to suffer three months' imprisonment.

(*k*) 1 Geo. II. s. 2. c. 14. 11 & 12 Will. III. c. 7.

CHAPTER V.

OF THE WAGES OF MERCHANT SEAMEN.

Seamen's wages.

HAVING considered in the preceding chapter the general duties of the mariners, and of the master in hiring them, we proceed now to the consideration of the more extensive head of seamen's wages. Under this head we shall have to explain, *first*, The mode of hiring a seamen; *secondly*, That of earning their wages; *thirdly*, To what cases the law has annexed the forfeiture of their wages in whole or part; and, *fourthly*, By what legal means they are recoverable at law.

And, *first*, As to the hiring of the seamen.

Written contract between master and seamen must declare the wages, and the contract must be signed by each seaman, but need not be sealed.

We have before stated, that, by the 2 Geo. II. c. 36., made perpetual by 2 Geo. III. c. 31., the contract between the master and mariners must be in writing, and that such contract must declare "what wages each seaman or mariner is to have respectively, during the whole voyage, or for so long time as he or they shall ship themselves for; and also must express in the said agreement or contract the voyage for which such seaman or mariner was shipped to perform the same." (*a*) This contract must be signed by each seaman within three days after he shall have entered himself on board the ship. Such contract need not be sealed; and in Clement *v.* Gunhouse, (*b*) where it appeared that a seal was affixed, it was ruled by Mr. J. Chambre, at Nisi Prius, that, though sealed, it was

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(*a*) 2 Geo. II. c. 36. made perpetual by 2 Geo. III. c. 31. This statute does not apply to the master's apprentices; and the penalty for not complying with its provisions, is 5*l*. from the master.

(*b*) 5 Esp. N. P. C. 83.

still regarded in law only as an agreement, and not as a deed, and must be sued upon as such.

Written contract necessary in the coasting trade; but need not be stamped.

The two statutes abovementioned (*c*) comprehended vessels engaged in the foreign trade beyond seas, and the British plantation trade only. The 31 Geo. III. c. 39. extended their provisions to vessels of the burthen of one hundred tons or upwards, employed in the *coasting trade* from any port or place in *Great Britain*, to any other port or place in *Great Britain*, and going to *open sea*. Accordingly, in all the three branches of our trade, the foreign, the colonial, and the coasting, the agreement between the master and the mariners must be by a written contract; the contract must be signed by the master and each seaman respectively; but need not be sealed, nor, as respects vessels engaged in the coasting trade, need be stamped. (*d*)

Seamen deserting in the West India trade, outwards or homewards, to lose all their wages.

In the early part of the late war the masters of ships trading to the West Indies, having suffered great inconvenience from the desertion of their seamen, and from a competition amongst the masters themselves to seduce the crews of each other by the offer of higher wages, the 37 Geo. III. c. 73. was passed, by which "every seaman, who shall desert at any time during the voyage, either out or home, from any British merchant ship trading to or from his majesty's colonies and plantations in the West Indies, shall, over and above all punishments, penalties, and forfeitures, to which he is now by law subject, forfeit all the wages he may have agreed for, or be entitled to, during the voyage, from the master or owner of the ship, on board of which he shall enter immediately after such desertion." (*e*) And in order to prevent the practice amongst masters of seducing the crews of each other, it is enacted by the second section of the same act, that every "master or commander of any British merchant ship, who shall

Masters seducing the seamen of

(*c*) 2 Geo. II. c. 36. 2 Geo. III. c. 31.

(*d*) 31 Geo. III. c. 39. s. 10.

(*e*) 37 Geo. III. c. 73. s. 1. For the penalties imposed by the act, see the Appendix.

hire or engage to serve on board his ship or vessel, any seaman, mariner, or other person, who shall, to the knowledge of such master, have deserted from any other ship or vessel, shall forfeit and pay the sum of *one hundred pounds*." And by the next following section of the same statute it is enacted, that no master of a merchant ship shall hire or engage any seamen in the West Indies to serve on board his vessel, at greater wages or hire than double the monthly wages of the seamen hired by him at the time of his last departure from Great Britain; "unless the governor, chief magistrate, or collector of such port or place in the said colonies or plantations, shall think that greater or more wages or hire, than double the monthly wages aforesaid, should or ought to be given to such seaman, mariner, or other person as aforesaid, and do and shall accordingly authorize or direct the same to be given by writing under his hand; that in such case the master or commander of such ship shall be at liberty to pay, and the seaman to receive, *such* greater wages as such governor, chief magistrate, or collector, shall *direct* as aforesaid."(*f*) All such contracts to be void, and the master to forfeit one hundred pounds for any seaman so hired contrary to the provisions of the act. The same act, however, proceeds in a following section to make two exceptions, *first*, As to mariners producing a certificate of discharge from their last ship; and, *secondly*, In the case of necessity, hazardous service, or extraordinary duty, proved upon oath, to mariners, who have not deserted from their last ship.(*g*) In both of these cases, the master is authorized to give more than double wages without the authority of the governor or other chief magistrate.

each other, hiring deserters, or giving more than double wages to any seamen hired in the West Indies, to forfeit one hundred pounds.

In case of certificate from last ship, that any seaman has not deserted, or in case of extreme hazard proved on oath, a master may hire seamen in the West Indies at more than double wages, without a licence from the governor.

The act then concludes by giving a form of the agreement between master and mariners, which its previous provisions require, and which will be found in our appendix.

(*f*) 37 Geo. III. c. 73. s. 3.

(*g*) The same act, s. 10.

Of the authority or licence given by the governor or other magistrate, in the West Indies, to hire seamen at more than double wages.

The authority or licence, which the governor or other magistrate in the West Indies must give in pursuance of this act, must not only authorize the master to hire such seamen at more than double wages; but must specify the rate of wages, and give the distinct permission of the governor, or other chief officer, to hire the seamen at the sum so expressed. The object of the act is to prevent a competition of the masters amongst each other to seduce the crews; and, in order to prevent this mischief, the law removes the master from the contract in the first instance, and substitutes the discretion of the governor, or other chief officer, in his place. The governor, therefore, must fix the sum for which such seamen in the West Indies may be hired, and the master may then oblige himself to give it. Accordingly in Rodgers *v.* Lacey, (*h*) where a licence had been given by a magistrate in the West Indies, to the master of a ship, "*to procure men on such terms as he could, to navigate the ship home,*" it was decided by the court, that this was not a compliance with the terms of the act; such a licence, so generally expressed, and leaving so much to the master, being in no degree calculated to meet the mischief, for the prevention of which the 37 Geo. III. c. 73. was passed; and that, therefore, a mariner could not maintain an action on a promise made in pursuance of such licence, to pay wages exceeding the amount of double the wages agreed to be given to a person in the like situation on the outward voyage.

The written contract is not only the agreement (*i*) between the parties; but is regarded in law as containing the whole of their obligations with respect to each other;

(*h*) 2 Bos. & Pull. 57.

(*i*) A verbal agreement, however, is not *per se* void; but the master is liable to a penalty of 5*l.* for each mariner, if he hire a seaman without an agreement in writing; but in an action brought by a seaman to recover his wages, the act provides that he shall not be nonsuited, or fail in his action, for omitting to produce the written articles on the trial; but that the master shall be bound to produce them. 2 Geo. II. c. 36. s. 8.

and, therefore, a seaman cannot recover any thing *verbally* agreed to be given him beyond what is specified in the articles. Thus in White *v.* Wilson, (*k*) the mate of a ship was not allowed to recover the average price of a slave at the place of a ship's destination, under the allegation in the declaration, that it had been promised to him, although not specified in his contract for service and wages with the master. And in Elsworth and wife *v.* Woolmore, (*l*) it was decided by Lord Alvanley, that a promise to pay to a sailmaker, serving in a ship belonging to the East India Company, a monthly sum beyond the wages mentioned in the ship's articles, which had been signed by him as sailmaker, was not good. And upon the same principle, namely, that the master by the contract has engaged the whole of the labour and skill of the seaman, it was decided by Lord Kenyon in Harris *v.* Watson, (*m*) and by Lord Ellenborough in Stilk *v.* Meyrick, (*n*) that any promise made by the master to the seamen, *when a ship was in distress*, that he would give them a sum *above* their wages, if they would exert themselves for the common safety, or that he would divide amongst them the wages of two seamen who had deserted, if he should not be able to supply their place, was void; "The seamen, said Lord Ellenborough in the latter case, having sold all their services till the voyage should be completed; and being bound by the terms of their original contract to exert themselves to the utmost to bring the ship to her destined port." And in Thompson *v.* Havelock, (*o*) Lord Ellenborough, in affirmation of the same rule of law, observed, that it could not be contended, that a servant, who had engaged to devote the whole of his time and attention to the concerns of one master, should be permitted to hire out his services, or a part of them, to another. "No man," continued his

A sailor cannot recover wages, upon any collateral promise, beyond the sum stipulated in the articles.

A promise to pay a sailor *extra* wages, for exertions when a ship is in distress, will not be binding upon the master or owners.

(*k*) 2 Bos. & Pull. 116; and 2 Rob. A. R. 241. (The Isabella)

(*l*) 5 Esp. N. P. C. p. 84., and Abbott, 448.

(*m*) Peake's N. P. C. 72.

(*n*) 2 Campb. 317.

(*o*) 1 Campb. 527.

Lordship, "should be allowed to have an interest against his duty. There would be no security in any department of life or of business, if servants could legally let themselves out in whole, or in part."

Case of the Vanguard.

It seems unnecessary to add, that in these contracts, as in all others, any agreement, in evasion, or contravention of the law is void from the beginning, and cannot be sued upon in any court of law or equity. In the Vanguard, (*p*) the mate of a slave ship having instituted a suit for his wages as mate and ostensible master of the ship, which was a union of characters contrary to the acts, and the regulation of the slave trade, Sir William Scott said, that his agreement with the owners was *ex turpi contractu*, and as such could not be sustained in law. That the contracting parties, namely, the owners and the mate, were in *pari delicto*, and that therefore the one was not at liberty to set up the contract against the other, and to allege that he was induced by the other to enter into such illegal agreement. It was as much the duty of the one not to yield to temptation, as it was of the other not to propose an illegal temptation. In such a case the law refuses to interpose between them, and leaves them to avail themselves of their dishonest engagements as they can.

Owners of ships are entitled to the *entire* services, as well of the master and the mates, as of the ordinary seamen.

Upon the principle before mentioned, that the owners of the ship are entitled to the WHOLE of the labour of their mariners, whether master, mate, or seaman; and that if any emergency shall require extraordinary efforts, such necessary exertions are still to be regarded as within the spirit of their contract, a mate who may become master by some casualty during the voyage, must sue for his wages not as master, but as mate through the whole time. His character of mate is not to be considered as merged in that of master, but the duties of the master are super-

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(*p*) 6 Rob. 207.

induced by the necessity of the case over his ordinary service as mate. (*q*)

Wages of seamen take precedence of bottomry bonds.

The wages of mariners take precedence of bottomry bonds, the sailor being entitled against all other persons to the proceeds as a security for wages; and the subsistence of the seamen is considered in many cases to be a part of their wages.

The Madonna D'Idra.

In the Madonna D'Idra, Papaghica, (*r*) a Greek ship having taken up money on bottomry bonds, and being arrested in the port of London by the lender, the crew presented a memorial to the Earl of Liverpool, stating that they had been defrauded of their wages by the captain, and were left destitute of support. Upon this representation the king's proctor received directions from the secretary of state's office, to take such steps as might be requisite to recover the wages due to the memorialists, who were, in the mean time, furnished with the means of subsistence, and afterwards sent to their own country by his majesty's government. In consequence of the directions thus received, the king's proctor intervened in the cause on behalf of the mariners. The holder of the bonds, and consignee of the cargo, consented to pay the wages due to these men, but declined to defray the charges incurred for their subsistence. The ship was sold under a decree of the court, and the proceeds brought into the registry; but the amount was not sufficient to satisfy the demands of the mariners, and of the bond-holder. Sir William Scott, in his judgment upon the case, said, that it must be taken as the universal law of the Admiralty Court, that mariners' wages take precedence of bottomry bonds. "Wages are sacred liens; and, as long as a plank remains, the sailor is entitled, against all other persons, to the proceeds as a security for his wages. This is a principle universally admitted; and whoever enters into a contract, or advances money upon

Sailors' wages precede all other claims upon the ship; and in many cases subsistence is part of a sailor's wages.

(*q*) Favourite, Nicholas de Jersey, 2 Rob. 232.

(*r*) Dod. 40.

Subsistence in many cases is part of a seaman's wages.

bottomry, must be presumed to do it with a full knowledge of the law upon this point. But, then, is the subsistence of these men to be considered as part of their wages? I think it is so to be considered; it is wages paid in another form, it is part of the compensation for their labour; and, according to the law of the country to which these men belong, subsistence in the intermediate time must be presumed to form part of the contract for the payment of wages. The parties must be subsisted till they return to their own country, unless some special reason is shewn to the contrary, such as desertion, or any kind of misconduct, which would work a forfeiture of wages. There is, indeed, no proof of any special agreement upon this point in the present case; but it is very material that such a covenant should be presumed to subsist between the parties." The claim of the sailors was accordingly allowed.

Of the earning of wages.

We come now to our second head, the earning of wages.

The general rule, with respect to the seamen having earned their wages, is, that if the voyage be completed, freight thereby earned, and the labour of the seamen not rendered useless by the loss of the vessel by sea or capture, they have earned their full wages, and are entitled to receive them. If the vessel be lost, the seamen must share in the calamity with the owners; and the misfortune of the latter must not be aggravated by having to bear the whole loss, and to indemnify their fellow-sufferers under a disaster belonging in common to all of them. Every party must bear that portion of the calamity which peculiarly belongs to him; the owners the loss of their ship, and the seamen the loss of their wages. Therefore, in the event of such loss, the seamen lose their wages, or are legally considered as not having earned them. But on the other hand, if a seaman be disabled in the course of the voyage by sickness, or accident, he is still entitled to his wages; the law humanely considering, that such cases are within the understood

If the vessel be lost, the seamen lose their wages.

conditions of the contract between the master and mariners. (*s*)

Freight must be earned to entitle a sailor to wages.

The seamen, therefore, have earned their wages upon the due completion of the voyage and earning of freight. Nor can a master, unless in a very strong case of mutiny, or in such an extreme and gross ill conduct as to endanger the ship, discharge any seaman during his voyage, so as to deprive him of his wages for the whole voyage; but such seaman, so discharged, will be entitled to his full wages up to the prosperous determination of the voyage, deducting, if the case require it, such sum as he may in the mean time have earned in another vessel. (*t*)

Impressed sailor entitled to his wages up to the time of his impressment, if the ship earn her freight.

But in an action by a seaman for his wages, where the master or owner intends to plead that no freight was earned, the *onus* of proving such plea lies upon such master or owner, and not upon the seaman. (*u*) That the contract of merchant seamen may not interfere with the public service, and that they may not be injured by any act of the state, it is expressly provided by the 2 Geo. II. c. 36, that a seaman belonging to any merchant ship, who enters into the service of his majesty on board any of his majesty's ships, shall not for such entry forfeit the wages due to him during the term of his service in the merchant ship, nor shall such entry be deemed a desertion. The principle of this provision is, indeed, so manifestly equitable, that it was acted upon previous to the late statutes in a case before Lord Raymond, where a seaman who was impressed from the merchant into the royal service, was judged to be entitled to receive a proportion of his wages up to the time of impressing, *the ship having afterwards arrived in safety at her port of discharge.* (*x*) It is an

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(*s*) Abernethy *v.* Laudale, Doug. 539. Chandler *v.* Grieves, 2 Hen. Black. 606. and Paul *v.* Eden, K. B. E. T. 25 Geo. III.

(*t*) Robinet *v.* The ship Exeter, 2 Rob. 261. The Beaver, Grierson, 3 Rob. 92.

(*u*) Brown *v.* Milner, 7 Taunt. 319.

(*x*) Wiggins *v.* Ingleton, 2 Ld. Raym. 1211.

Impressed mariner is only entitled to wages due up to the time of his impressment.

equally manifest equity, that such an impressed mariner shall receive no further wages than what are due at the time of impressment. In the Jack Park, Little, (*y*) a seaman, in an action against the master, demanded the whole of his wages, on a suggestion that the master had procured him to be impressed. In delivering his judgment upon the case, Sir William Scott observed, that this action was very properly brought against the master, the wages of mariners being of such a high nature, that the master is liable, the ship is liable, and the owner is liable. The mariner is entitled to his option; and in some respects, perhaps, there is less inconvenience occasioned by proceeding against the master, because in that case the ship is not detained. The master's plea in this case was, that the mariner had been impressed into the king's service; and, therefore, his contract of service had not been fulfilled. *Primâ facie*, therefore, the seaman was not entitled; but if he could shew that his impressment had been by the malicious act of the master, and that he had thereby been prevented from completing his engagement, he would be entitled to recover his wages to the whole amount: but that the proof of this allegation had failed. The claim was accordingly rejected.

The Jack Park, Little.

We have been the more full in reporting this case, as it is the frequent practice of masters of merchantmen to get rid of any seaman who may give trouble by procuring them to be impressed; a dangerous exertion of power, unless in a case of actual mutiny.

Impressment of a seaman not to be deemed a breach of his contract.

The impressment of a seaman, not being his voluntary act, amounts in no case to a breach of his contract, nor to the loss of any advantages to which he is fairly entitled under it. Upon this principle, a seaman on board a privateer being entitled by his agreement to a certain share in every prize taken, provided he served six months; but

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(*y*) 4 Rob. 308.

who was impressed before the expiration of that period, was judged not to have lost his share of a prize taken whilst he was in the privateer. (z) But, on the other hand, such an impressment will not place him in a better condition as to such wages, than he would have been, if he had remained on board the ship; and, therefore, if the ship be afterwards captured, he loses his wages in common with those whom he leaves behind. (*a*)

Wages of a seaman generally not due till the completion of the voyage.

As the wages of a seaman are not due till the completion of a voyage, and depend upon its prosperous completion or earning of freight, there was formerly some uncertainty whether the administrators or executors of a seaman, dying in the course of the voyage, could recover wages for him proportionate to the time of his service. (*b*). But this doubt seems at present removed by the direct authority of the 37th of the king, c. 73, the fifth section of which enacts, that the master on his arrival out or home shall deliver a list to the collector of the port of all seamen "who have died during the voyage, and also a true account of the wages due to each seaman, mariner, or other person so dying, or the time of his death." And the seventh section of the same statute proceeds further to enact, that all such wages of seamen dying in the course of the voyage, shall be paid by the master "to the receiver of the sixpenny duty for the Greenwich Hospital, to the use of the executors or administrators of such deceased seamen;" and if any master shall neglect or refuse to pay over such wages within three months after his arrival, he

Case of a seaman dying upon the voyage.

(z) Paul *v.* Eden, K. B. E. T. 25 Geo. III. and *ante*, 445.

(*a*) 2 Campb, 320. in a note.

(*b*) See Cutter *v.* Powell, where the court refused the demand of a mariner's executors, because the sum agreed for as his wages, if he completed the voyage, was so large, as to have the air of being made in prospect of all casualties, namely, that nothing should be paid, if by any casualty he did not complete the voyage. The court, however, observed, that if the plaintiff could have proved an usage to pay a proportional sum in similar cases, their decision would have been the other way. 6 T. R. 320.

Of the wages due to the representatives of seamen dying upon the voyage: and see *post.*

shall forfeit fifty pounds for each offence, and also "double the amount of the sum of money so due to any seaman, mariner, or other person, for wages, as aforesaid."

The above terms of the act may, therefore, be considered as an acknowledgment by the legislature that such wages may be due and legally demanded, and the courts have acted upon this principle. Thus in Armstrong *v.* Smith, (*c*) where a master had paid 9*l.* to the receiver at Greenwich, for the full wages due to a mate who had died on the voyage, and his administratrix, insisting that 16*l.* more was due, brought her action for that sum. Sir James Mansfield acknowledged her right to bring the action, and the Jury gave her the 16*l.* upon proof of 25*l.* being due.

Of the claim for wages where the voyage is divided into parts.

The general rule of law being, that freight is the mother of wages, the seamen are deemed to have earned their wages in all cases in which the vessel has earned its freight. If a voyage, therefore, consist of parts, such as an outward and a homeward voyage, or several parts successively, the freight for each part being due when it is finished, the wages for that part would likewise be due, unless (as is usually the case) the contract stipulates for all the parts as for one voyage. (*d*) And if money be advanced by the owners in part of freight, the seamen may recover for their wages in the proportion of the sum advanced to the whole freight. (*e*) In all cases the question of wages turns upon the same principle, whether the ship have earned her freight or not. And in order to prevent any dispute with respect to dividing any voyage into parts, it is now usual to stipulate in express terms in the agreement with the seaman, that no officer or seaman, or person belonging to the ship, shall be entitled to his wages, unless the vessel shall return to, and arrive at the port of London, (supposing London to be her home port,) notwithstanding the ship shall at any time have broken

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(*c*) 1 Bos. & Pull. N. P. 299; and see *post,*

(*d*) Ld. Raym. 639. 739.

(*e*) Anon. 2 Show. 283.

bulk, or delivered any goods at any place or port whatever. This stipulation is intended to meet a difficulty which arose in the case of Buck *v.* Rawlinson, and Edwards *v.* Child, (*f*) upon which the Courts of Admiralty and Common Law were divided, whether the seamen were bound by a charter party of the owners not to demand freight for the outward cargo, unless the ship likewise brought back her homeward cargo in safety. Indeed, in Appleby *v.* Dods, (*g*) it was determined by the Court of King's Bench, that the ordinary terms in a seaman's agreement, namely, that no seaman shall be entitled to wages until the arrival of the ship at her above mentioned port of discharge, and her cargo delivered, were to be interpreted to mean the return of the ship to her port at home.

Where it is stipulated that seamen shall not demand, or be entitled to, their wages, or any part thereof, until the ship arrive at her port of discharge, they cannot, on a loss before arrival, claim freight *pro rata*, on the ground that freight has been earned at an intermediate port.

Upon the common principles of all contracts, if the seamen be hired, and the owners change their purpose of sending the vessel upon its voyage, the seamen are to be paid for the time during which they are detained. (*h*)

If seamen are hired for a voyage, and the owners detain the ship, they are nevertheless entitled to wages.

It has already been stated, that as wages follow the earning of freight, so the loss or capture of the ship, or its being disabled in the course of the voyage, is attended with the loss of wages by the seamen. (*i*) In Eaken *v.* Thom, (*k*) the plaintiff, a seaman, made a claim of his wages, upon the ground that the ship had been compelled to discontinue her voyage only because she was not sea-

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(*f*) Buck *v.* Rawlinson, 1 Bro. P. C. 102. Edwards *v.* Child, 2 Vern. 727.

(*g*) 8 East. 300.

(*h*) Wells *v.* Osman, 2 Ld. Raym. 1044, and Beale *v.* Thompson, 3 Bos. & Pull. 465.

(*i*) In Hernaman *v.* Bawden, 3 Burr. 1844, the ship had sailed to one place to take in a cargo to be conveyed to another; she arrived at the first place, but was lost with her cargo in going to the other. The court decided, that no freight had been earned; and, therefore, no wages.—See Yates *v.* Hall, 1 T. R. 79.

(*k*) 5 Esp. N. P. 6. See likewise Abernethy *v.* Landale, Doug. 539.

But not if the ship discontinue her voyage on account of her being unseaworthy, and no freight be earned. *Semble*, a special action on the case may be maintained by a sailor under these circumstances.

worthy at her outset: and that, therefore, it was the fault of the owner, and not any accident of the sea or weather, which caused the failure of the voyage. But Lord Ellenborough said, that the cases had never made this distinction. The rule of law was general. The ship must perform her voyage to entitle the seaman to recover his wages; and if the owner sent her out under such circumstances as were stated, it should be the object of a special action on the case; but he was of opinion, that the sailor could not, on the ground stated, recover his wages.

Beale *v.* Thompson.

In the case of capture and re-capture, if the seaman be not separated from the ship, but continues on board of her, and completes the voyage so that freight is earned, he is entitled to wages under his first agreement. (*l*) But if the seaman be separated, and afterwards so detained, that the master upon the re-capture is compelled to hire another to perform his duty, the master of course would not be bound to pay both; and, therefore, the detained seaman must lose his wages. (*m*) In the case of the Aquilon, Beale *v.* Thompson, (*n*) one of the vessels embargoed by the emperor Paul, but afterwards restored, and the crews re-placed on board, the Court of King's Bench decided, that such an embargo was not to be regarded as an hostile capture; and, therefore, that the seamen who had been taken from their vessels, and marched up into the country, but who had been afterwards replaced on board their vessels, were not to lose their wages as if the vessel had been hostilely taken. And that the separation of the seamen from their vessels, not being voluntary upon their parts, but an act of violence by the Russian authorities, was not that kind of departure from the ship which was contemplated by the articles, and the acts of parliament upon which they are founded, as a case under

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(*l*) Bergstrom *v.* Mills, 3 Esp. N. P. 36. But see Chandler *v.* Meade, 2 Lord Raymond, 1211.

(*m*) The Friends, Bell, 4 Rob. A. R. 143.

(*n*) 3 Bos. & Pull. 405.

which the seaman should forfeit his wages. The principle of this decision was further affirmed by the same court in Johnson *v.* Broderick, (*o*) another case arising out of the same transaction.

Seamen violently detained by an embargo, and separated from the ship, but afterwards restored, and navigating the ship home, are entitled to wages during the whole time of their detention, such ship having earned her freight.

The time at which the seamen may demand their wages is settled by the express terms of the agreement now in common use between the master and mariners; the contract stipulating, that no officer or seaman, or person belonging to the ship, shall demand or be entitled to his wages, or any part thereof, until the arrival of the ship at the port of discharge, and her cargo delivered; nor in less than twenty days in case the seaman is not employed in such delivery. It has been before stated, that the terms, the abovementioned port of discharge, mean the port of discharge and delivery at the vessel's return to this country. The two statutes so often quoted, the 2 Geo. II. c. 36, and the 31 Geo. III. c. 39. likewise regulate the time at which masters shall pay their seamen; the first of these statutes relating to ships engaged in *foreign voyages*, directs that the seamen shall be paid in *thirty days* after the ship's entry at the custom house, and the latter, as to ships employed in the coasting trade, directs that the seamen employed on board coasters shall be paid within five days after the ship shall be entered at the custom house, or the cargo be delivered, or at the time the seamen shall be discharged, which shall first happen.

But where a seaman was restricted by the ship's articles from demanding his wages before the expiration of twenty days; but the captain before the expiration of that time had admitted a certain sum to be due, and offered to pay

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(*o*) 4 East. 566. These cases were removed to K. B. by writ of error from the Common Pleas. They afterwards came before the House of Lords on writ of error from K. B., when the judgment of K. B. was affirmed 1 Dow. P. R. 299. And see Pratt *v.* Cuff, cited in Thompson *v.* Rowcroft, 4 East. 43; and Loweth *v.* Fothergill, and Delamainer *v.* Winteringham, 4 Camph. 185, and 186.

it; it was held, that the articles did not attach upon wages so admitted to be due; and that the plaintiff's action was well brought, though before the twenty days had expired. (*p*).

Agreements between the sailors and masters belonging to foreign vessels, according to the custom of their respective countries, are binding in English courts.

But as foreign merchants and masters have different customs from those of Great Britain, the British courts of law will of course respect these customs, and any covenants made under them. And, therefore, in Gienar *v.* Meyer, (*q*) the covenant of the seamen and masters containing a clause that none of the seamen should institute any suit against the master in foreign countries, it was held that the action could not be maintained. (*r*)

We proceed now to our third head, the forfeiture of wages.

Of the forfeiture of wages.

All the acts of seamen which the law punishes by the forfeiture of their wages are either breaches of their agreement with the master, or violations of acts of parliament passed for the regulation of merchant sailors. These acts, as we have frequently before had occasion to state, are the 2 Geo. II. c. 36; 31 Geo. III. c. 39; and the 37 Geo. III. c. 73. all of which will be found in our Appendix. The first case of forfeiture of wages is desertion from the ship. Such desertion was punished by the forfeiture of wages by an act as early as William the Third; (*s*) but which punishment is more expressly ordained by the 2 Geo. II. c. 36. in which it is enacted, "That in case any seaman or mariner shall desert, or refuse to proceed on the voyage on board any ship or vessel, bound to parts beyond the seas, as aforesaid, or that shall desert from the ship or vessel, to which he or they shall belong, in parts beyond the seas, after he or they shall have signed such contract or agreement, he or they shall

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(*p*) White *v.* Mattison, 2 Star. N. P. 325.

(*q*) 2 Hen. Black. 603.

(*r*) See likewise as to foreign customs in paying seamen, Hull *v.* Heitman. Abbott, 463.

(*s*) 11 & 12 Will. III. c. 7. s. 17.

forfeit to the owners of such ship or vessel the wages which shall be due to him or them, at the time of his or their deserting from such ship or vessel, or obstinately refusing to proceed on such voyage."

The Pearl, Denton.

The Pearl, Denton,(*t*) is a principal case under this head, being distinguished by the peculiar circumstance that the master had given permission to the crew to leave the vessel against the declared will of the owner. The sailors were hired by the master in the Downs, for the run to Hull, at twelve guineas per man, and they were in fact only three days occupied in that navigation. When the ship arrived in the Humber, the port of Hull was so full that the vessel could not enter immediately; and the master was induced to come to anchor in the Roadstead, where these men insisted on quitting the ship, as having completed their voyage. It was proved, that though the master permitted the mariners to depart, the owners expressly warned them not to leave the ship; indeed, the mariners themselves offered to remit a guinea of their wages, or to hire others. Sir William Scott, in giving judgment, said, That in order to support a claim of this kind, a mariner must prove one of two points; either the performance of the contract, or that some circumstance had intervened, which would equitably discharge him from its terms, and continue to him the benefit of a legal and virtual performance. The obligation of mariners is for the whole voyage, in the river as well as at sea; and if the port lies high up the river, a very considerable portion of their services may remain to be performed in the river. The contract for the voyage, therefore, was not performed in its terms. The next consideration was, whether there was any equitable ground for exempting the sailors from this compliance in terms, and the ground alleged was the consent of the master. The master undoubtedly had given this consent; but he had no authority to do so against the declared will of his

A master cannot give a sailor leave to absent himself against the declared will of the owners of th ship.

(*t*) 5 Rob. 224.

The Pearl, Denton.

owners. The owners themselves had come on board, and told the mariners that they had not arrived in port, and that they were not to be discharged. The master was but their representative in making the contract; and they had a right to insist on the full performance of it.

Under these circumstances the learned Judge pronounced that the mariners had failed in their case, and were not entitled to their wages.

But the courts of law will not suffer the sailors to be surprised into these acts of forfeiture; nor to lose their wages for an act, which is indifferent in its consequences, and venial in its circumstances, though not a compliance in terms with their agreement. But the act must be such as in no degree to injure the ship or the venture; and the permission of the master must be reasonably implied. And, therefore, in Neave *v.* Prat, (*u*) where the vessel was safe in port, and had no cargo to discharge, and a seaman, (who had served eight weeks out of the three months for which he was engaged,) asked permission of the mate to go on shore to see his wife, and being told by the mate, that he could not say whether he might have leave or not, did so go on shore, the learned Judge told the Jury that he thought the master could not have refused the leave asked without a sufficient reason; and left it to them to consider whether the ship was in a place of safety or not, upon which the Jury found a verdict for the seaman.

By the sixth section of the 2 Geo. II. c. 36. it is enacted, "That in case any seaman or mariner, not entering into the service of his majesty, his heirs and successors, shall leave such ship or vessel to which he or they belong, before he or they shall have a discharge in writing from the master or commander, or other person having the charge of such ship or vessel, he or they so leaving such ship or

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(*u*) 2 Bos. & Pull. N. R. 408.

Frontine *v.* Frost

vessel shall forfeit one month's pay" to the use of Greenwich Hospital. In Frontine *v.* Frost, (*v*) the plaintiff, a ship's carpenter, had quitted the ship after her arrival in port, but before she was moored. The defendant contended, that the plaintiff had thereby forfeited his whole wages under the 2 Geo. II. c. 36.; or at least, that he had forfeited a month's wages to Greenwich Hospital by absenting himself without leave in writing. The Jury, under the direction of the Judge at Guildhall, having found a verdict for the plaintiff subject to the opinion of the court upon both points; and the matter afterwards coming to argument in the Common Pleas against the rule Nisi for setting aside the verdict, Lord Alvanley, Chief Justice, delivered an opinion so illustrative of the whole subject of seamen's wages, that it will save much future explanation to give it at length. "An attempt has been made in this case," his Lordship said, "to put a new construction on the articles, (the articles between master and mariners,) which are in the usual printed form. Those articles provide that twenty-four hours' absence without leave shall be deemed a total desertion, and render every seaman liable to the forfeitures and penalties in the 2 Geo. II. c. 36., and the 37 Geo. III. c. 73. But this clause of the articles cannot be supposed to render seamen liable to the penalty imposed by those acts for desertion in cases to which the acts themselves do not apply. Now it is clear that the intention of the legislature in inflicting a forfeiture of the seaman's whole wages for desertion by 2 Geo. II. c. 36. s. 3. was confined to the case of his refusing to proceed on the voyage, or quitting the ship abroad, by which the master might be exposed to the necessity of hiring another person to supply his place at an exorbitant rate of wages. It is provided by the fifth section, that if any seaman shall absent himself without leave from the commanding officer, he shall forfeit two days' pay to the use of Greenwich Hospital. The meaning of these two sections is, that if the sailor run away be-

1. A seaman who quits his ship after her arrival in port, but before she is moored, does not thereby subject himself to the forfeiture of his whole wages. 2. To entitle the master to deduct a month's wages for the benefit of G. H., it is incumbent on him to shew, that the seaman quitted the ship without leave in writing. 3 And such a deduction cannot be set off by the master, in an action for wages by the seaman, unless the master has previ-

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(*v*) 3 Bos. & Pull. 302.

ously debited himself to G. H., for the amount, in a book kept according to the direction of the statute 2 Geo. II. c. 36. s. 6, 9.

fore the voyage is commenced, or in ports beyond the seas, he shall forfeit his whole wages; if he absent himself during the voyage and return, he shall forfeit two days' pay. It having been found, however, that seamen were in the habit of quitting the ship after her arrival at the port of delivery, and before the ship was unladen, a clause was introduced authorising the master to deduct a month's wages where any seaman was guilty of such offence. And, to prevent persons from setting up a pretended permission, it was provided that the permission should be in writing. But if the master make this deduction, he should immediately make an entry to that effect in a book to be kept for that purpose; which book must be signed by himself and two principal officers of the ship. Unless this be complied with, I do not see how the master is to avail himself of the deduction by way of set-off in an action for the wages. The next question is, whether the case were properly left to the jury upon the evidence? In cases of forfeiture, the best evidence of which the nature of the case admits ought to be given by the party who insists upon the forfeiture. It is said, however, that a negative cannot be proved; but there are many cases in which it may; and in this case it might have been shewn that the mate, who at the time had the command of the ship, had not given a discharge. It appeared, indeed, that the plaintiff went away at the same time with most of the other seamen, at a period when he might or might not be wanted, and when the seamen commonly have leave to go on shore. I think, therefore, that there was a fair ground for the jury to infer that the absence was not without permission."

The Baltic Merchant, Smith.

In the Baltic Merchant, Smith, (*w*) Sir William Scott, having occasion to refer to this judgment, and in some degree to contest the conclusion which had been popularly drawn from it, made the following observations: "The case of Frontine and Frost produced a great deal of de-

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(*w*) Edw. A. D. Rep. 86.

Owners entitled to compensation for defect of due service from seamen, over and above the forfeiture of wages by statute to G. H.

liberation among the judges of the court in which it was considered; and it was there laid down pretty strongly in the argument of council, that the delinquent does not forfeit the whole of his wages, which is true. But it was further argued, that the master must have debited himself to *Greenwich Hospital* in order to entitle himself to make the deduction, on the ground that the deduction is for the benefit of that charity, and not for the compensation of the owner. Now I take the interpretation of the case to be this, that it will not entitle the owner to set-off the forfeiture to *Greenwich Hospital* as a forfeiture under the statute which he had done in his pleadings, unless he shall have complied with the requisitions of the statute, not that he shall lose his own right of deducting a compensation due to himself personally on account of the imperfect execution of the contract. I have had opportunities of conversing with very learned persons who were interested in that judgment, and from whom I understand that the authority of their opinions concurs in sustaining the proposition that the owner is not debarred by the provisions of the statute from those rights to which he was entitled under the old law. The legislature never could have intended to deprive the owner of his remedy, when it superadded this forfeiture in favour of the hospital, which was to be obtained in the modes it has prescribed. This case does not, I think, in any manner interfere with the principle which I have laid down, that the owner is at liberty to set-off the compensation to which he is entitled against a demand for wages independently of that statute."

West India voyage not completed till the arrival of the ship in the W. D.; and wages forfeited by desertion of the ship in the River Thames.

The subject of contest in the above case, the Baltic Merchant, was, whether a seaman was to forfeit his whole wages, or one month's pay to Greenwich Hospital only, who had quitted a West India vessel without leave a little below Blackwall, and before her entrance into the West India Dock, her proper place of unlading, in consequence of which the owners had been compelled to hire another in order to assist in discharging the vessel. The owners

Baltic Merchant.

insisted upon the trial that this was a total breach of the agreement; a total failure of their contract to complete the voyage; and, therefore, that the entire right to wages was forfeited. Sir William Scott was of the same opinion, and decreed accordingly. He added, that the voyage was not completed, in the interpretation of law, by the mere fact of arrival; but that the act of mooring was an act to be done by the crew, and that the duty of the seamen extended to the time of the delivering of the cargo. That the forfeiture of the whole wages in such a case is not to be regarded as a mere penalty in law; but as a civil compensation for injury received, existing in all reason and justice antecedently to any statute upon the subject. (*x*)

As respects the penalties and forfeitures claimed or retained by the master under the 2 Geo. II. c. 36. it will be seen by Lord Alvanley's judgment in Frontine *v.* Frost above reported, (*y*) that the master must enter such penalties in a book to be kept for that purpose, and must have such entries signed by himself and two or more principal officers; and, further, that he cannot make such deductions unless such entries have been duly made.

In the case of seamen employed in the coasting trade, in vessels of one hundred tons and upwards, if any seaman should refuse to proceed on his voyage, after signing the article, he is to forfeit all the wages due to him at that time; but if he desert after the commencement of the voyage, and at any time before the delivery of the cargo, or before he shall have a discharge in writing from the master, he is to forfeit one month's wages to the use of Greenwich Hospital. (*z*)

Wilful absence from the ship, without leave, is in all cases, both as to coasters and others, to be punished by

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(*x*) The Baltic Merchant, Edw. Adm. Rep. 86.

(*y*) See *ante*, page, 455.

(*z*) See *ante*, page.

the forfeiture of two days' pay, for each day's absence, to the use of Greenwich Hospital. If the voyage in the coasting trade be for less than a month, the forfeiture of a month's pay, under the act, is to be considered as the forfeiture of the whole wages. (*a*)

The master may waive the seamen's forfeiture of his wages.

But such forfeiture may, of course, be waived by the party interested, and therefore, in Miller *v.* Brant, (*b*) where a seaman was absent a day and a night from the ship, but having afterwards returned was received by the master and employed in his regular duties, it was decided by the court that the master had waived the forfeiture, and the seaman was entitled to recover his wages.

In the case of desertion from a British ship in the West Indies, the seaman, by the 37 Geo. III. c. 73. is not only to forfeit all his wages as to the ship from which he deserted, but likewise as to the ship on board of which he has served.

Gross neglect of duty by a seaman is subject to a forfeiture of wages. But if a seaman be wrongfully dismissed, or obliged to leave the ship on account of inhuman treatment, it will not amount to desertion, and he will be entitled to his wages.

It has been before stated, that by the 22 and 23 of Charles II. c. 11. the crime of refusing to co-operate with the master in the defence of ships against pirates and enemies, is punished by loss of wages. And, in the case of Robinet *v.* The ship Exeter, (*c*) Sir William Scott, in delivering his judgment, observed, that neglect of duty, drunkenness, and disobedience, existing in a gross and extreme degree, was sufficient to deprive a seaman of his wages. But the neglect of duty must be wilful, and amount to that degree of inattention which might expose the ship to danger. The drunkenness must have the same character—must be extreme and habitual—and not one or more of those acts of intemperance too common amidst the hardships of seafaring life. What the same learned Judge added, in the same case, as the description of what the court would regard as disobedience of orders

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(*a*) 31 Geo. III. c. 39. s. 9. (*b*) 2 Campb. 590. (*c*) 2 Rob. 261.

Robinet *v.* The ship Exeter.

is at the same time so precise in itself, and so characterised by the knowledge of life and of the manners of men, that we shall consult the satisfaction of the intelligent reader by giving it at length. "As to disobedience of lawful commands, (said Sir W. SCOTT,) it is an offence of the grossest kind; the court would be particularly attentive to preserve that subordination and discipline on board of ship which is so indispensably necessary for the preservation of the whole service, and of every person concerned in it. It would not, therefore, be a peremptory or harsh tone, or an overcharged manner in the exercise of authority, that will be ever held by this court to justify resistance. It will not be sufficient that there has been a want of that personal attention and civility which usually takes place on other occasions, and might be wished, generally, to attend the exercise of authority. The nature of the service requires that those persons who engage in it should accommodate themselves to the circumstances attending it; and those circumstances are not unfrequently urgent, and create strong sensations, which naturally find their way in strong expressions and violent demeanor. The persons subject to this species of authority are not to be captious, or to take exception to a neglect of formal and ceremonious observances of behaviour; and, on these grounds, the court would hold, that the charges of this defence are *of a nature* sufficient to justify dismissal, if they are properly substantiated in evidence; although, it might, at the same time, be proved that less personal civility had been used, than would excuse something of an hesitation of obedience in other modes of life." But it has been determined that where, by a ship's articles, no wages are to be paid until the vessel reaches her ultimate port of destination, and the master wrongfully dismisses a seaman, the wages are payable immediately. (*d*) So, where a seaman sent on shore, on duty, requested permission to

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(*d*) Sigard *v.* Roberts, 3 Esp. N. P. 71. per Lord Eldon.

be permitted to stay there to get food, having had none in the course of the day; and, permission being refused, he remained there till the next morning, when he returned to the ship, but was not received; it was held to be no desertion. (*e*) Nor is it desertion, if a sailor leave a ship on account of inhuman treatment. (*f*)

A seaman does not lose his whole wages, nor *semble*, even a proportionable part, by another seaman embezzling the cargo.

In the case of any embezzlement or wilful injury to the cargo, the master may deduct the value of the injury sustained from the wages of those concerned. But such deduction must be made from those only guilty of such act of embezzlement, wilful injury, or gross negligence. And, therefore, in Thomson *v.* Collins (*g*), it was said by the Court, that the master could not levy a contribution on the innocent part of the crew for the misconduct of the others.

Of the means by which seamen may recover their wages.

We now proceed to the fourth head of seamen's wages, namely, the process of law by which, in the case of dispute, they may be recovered. And it seems scarcely necessary to say, that the suit for wages, if personal against the owners, and not in *re* against the ship, can only be maintained against the parties signing the articles with the seamen, or the owners in actual possession. Therefore, it has been holden, that where a ship was mortgaged, but the mortgagor continued in possession, the master or seamen employed by the mortgagor could not maintain an action for wages and disbursements against the mortgagee, upon the ground that there was no privity of contract between them: For where there is an express contract with the mortgagor, the legal ownership of the ship becomes immaterial. (*h*)

The master must sue the owners personally; he has no lien upon, nor process in, the

It has already been repeatedly stated, that the seamen, with

(*e*) Sigard *v.* Roberts.

(*f*) Linland *v.* Stephens, 3 Esp. 269.

(*g*) 1 Bos. and Pull. N. R. 347.

(*h*) Annett *v.* Carstairs, 3 Camp. 356; and see *ante*, Martin *v.* Paxton, 353.

Court of Admiralty against the ship.

the exception of the master, have in all ordinary cases a three-fold remedy—against the ship, the owners, and the master; but that the master, from a just jealousy of the law, is excluded from any lien or claim upon the ship in *re*, and must, therefore, sue the owners personally in a court of law. The master's contract is personally with the owners: he trusts to their credit; and must, therefore, bring his action in the common law courts on the contract, and he cannot sue the ship in the Admiralty. Thus, in Smith *v.* Plummer, (*i*) it was determined that the master had no lien on the ship or freight for wages, or other disbursements on account of the ship. All the seamen, however, either singly or altogether, except the master, may sue in the court of Admiralty, and may arrest the ship by the process of that court, as a security for their demand, or may cite the master, or owners personally to answer them. By the term, *in all ordinary cases*, it is to be understood, that the seamen are hired in the usual manner, that is, by the usual articles, and not by a *deed*. This, therefore, is the general rule as to the manner of suing for wages by seamen, as appears not only from all the cases hitherto stated, but from a series of them from the earliest times downwards, collected in the note below. (*k*)

Seamen may arrest the ship for wages by suit in the Court of Admiralty.

Of the jurisdiction of the Court of Admiralty.

The jurisdiction of the Court of Admiralty, indeed, is, by its constitution, confined to causes and disputes arising upon the high seas; and, by two statutes (13 Rich. II. stat. 11. c. 5. and 15 Rich. II. c. 3.) is expressly commanded not to meddle in any thing *done within the realm*,

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(*i*) 1 Barn. and Ald. 571.

(*k*) Ragg *v* King, 2 Str. 858. 1 Barnard, 297. Clay *v.* Snellgrave, Salk. 33. 1 Lord Raym. 576. 12 Mod. 405. Carth. 518. Read *v.* Chapman, 2 Stra. 937. The Favorite, De Jersey, 2 Rob. A. R. 232. Winch, 8. Allison *v.* March, 2 Vent. 181. Anon. 8. Mod. 379. Bins *v.* Parre, 2 Lord Raym. 1206. The *Boatswain*, King *v.* Rag, 2 Stra, 858. 1 Barnard, 297. The *Carpenter*, Wheeler *v.* Thomson, 1 Stra. 707. The *Surgeon*, Sayer, 136. The *Mate*, Bayley *v.* Grant, 1 Lord Raym. 632.

nor with any contracts, pleas, and quarrels *arising within the bodies of counties*. But from the great advantages of the seamen being enabled to proceed in a court in which all may join in one suit, and may, moreover, have the ship as their security, the courts of law have given a liberal indulgence to this jurisdiction, and as large an interpretation as is possible to the restrictive words of the two statutes. And hence, if a party, having a good ground of prohibition, shall, nevertheless, suffer the cause to proceed to a judgment upon its merits in the Court of Admiralty, the courts of common law will not interfere afterwards, nor allow him to avail himself of an objection which they regard him as having waived. (*l*) "Indeed, if the master, (says the learned writer to whom this subject is so much indebted,) have obtained a sentence in the Court of Admiralty upon the usual allegation, stating that he was hired within the jurisdiction of that court, the courts of Westminster-hall will not prohibit the execution of the sentence." (*m*)

Nor are the seamen, in suing in the Admiralty Court, confined only to their actual service at sea; they may sue likewise for their wages earned in rigging and fitting out a ship for a voyage, though the owners have not prosecuted such voyage. (*n*) They may sue likewise in the same court for the wages of a coasting voyage, or for navigating a vessel from one port of England to another; (*o*) and if the subject come before the Court of Admiralty in a suit instituted, the court may decide whether a place at which a ship shall have arrived be such a determination of the voyage as to entitle the seaman to wages. (*p*)

(*l*) Buggin *v.* Bennet, 4 Burr. 2035.

(*m*) Barber and another *v.* Wharton, 2 Lord Raymond, 1452. Abbott, 485.

(*n*) Wills *v.* Osman, 2 Lord Raymond, 1044. 6 Mod. 238. Mills and Another *v.* Gregory, Sayer, 127.

(*o*) Anon. 1 Vent. 343.

(*p*) Brown *v.* Benn and Others, 2 Lord Raymond, 1247.

The Court of Admiralty extends to foreign seamen.

The Court of Admiralty will extend to foreign seamen, whose ships are in a British port, the advantage of the same remedy against their ships for wages, but will not entertain such a suit, where the contract is of a special kind, necessarily referring to their own laws; such law, not being incorporated in the contracts, and, therefore, not before the court. But if foreign sailors, before the commencement of a voyage, stipulate in their own country that they will not sue the captain for any money abroad, they cannot maintain an action against him for wages in the courts of this country. And the 2 Geo. II. c. 36. does not apply to the case of British seamen entering on board a foreign ship in a British port. (*q*)

As the master, though an agent and servant of the owners, has a distinct interest from them, in any suit against the owners, he may be a witness in their behalf in an action for sailors' wages. (*r*)

Such, therefore, is the rule and the practice in actions for their wages by seamen, namely, that all except the master may sue the ship in specie in the Admiralty, provided only that the articles in substance, if not in letter, be of the common kind, in which case there will be no difference whether such articles be with or without a seal. For, as was said by one of the Judges of the King's Bench, in a case upon an analogous subject, If the Court of Admiralty has jurisdiction over *the subject matter*, the circumstance of the instrument being under seal does not deprive them of their jurisdiction. (*s*)

If the agreement for wages be *special*, and under seal, the common law courts will prohibit the Admiralty jurisdiction.

But if the agreement between the master and mariners be of a special nature, and be under seal, that is to say,

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(*q*) The Courtney, English, 1 Edw. 239. Johnson *v.* Mackielsen, 3 Campb. 44 and Dickman *v.* Benson, *ibid.* 290.

(*r*) The Lady Ann, Wardell, 1 Edw. 235.

(*s*) Menetone *v.* Gibbons, 3 T. R. 207.

be a deed, as the fact of such deed, if denied, cannot be tried in a Court of Admiralty, so a court of common law upon the allegation that such a special agreement or such a deed exists, will issue its prohibition to the Court of Admiralty from proceeding in the suit. But it appears to be the safer course, that the master or owners intending to use such a defence, should plead such special agreement in the Court of Admiralty, as a bar to the jurisdiction of that court; and should only apply to the Court of King's Bench, if the Court of Admiralty should not allow the plea. (*t*) But if they suffer the Admiralty Court to proceed to sentence, they cannot afterwards, as we have already said, avail themselves of such objection. (*u*) Yet if the application be made to the Court of King's Bench before the sentence of the Court of Admiralty, the Court of King's Bench is bound to entertain the motion; and, if satisfied of the truth of the allegation, to issue its prohibition. Thus, in Ossy *v.* Child and others, (*x*) which was a motion made for a prohibition to the Court of Admiralty in a suit there for mariner's wages, upon a suggestion of a contract made for them upon land, the Court held, that for the convenience of seamen the Admiralty had been allowed to hold pleas for mariner's wages, but yet with this limitation, that if there be any special agreement, by which the mariners are to receive their wages in any other manner than is usual, or if the agreement be under seal, so as to be more than a parol agreement, in such case a prohibition shall be granted; and so it was granted in this case. In Day *v.* Serle, (*y*) and Howe *v.* Napier, (*z*) the Court of King's Bench granted similar prohibitions upon the authority of the above case. In the former of these cases, the

Of prohibition to the Courts of Admiralty in actions for seamen's wages.

(*t*) The Mariner's Case, 8 Mod. 379. Trin. T. 11 Geo. I.

(*u*) Buggin *v.* Bennet, 4 Burr. 2035. A prohibition to the Admiralty, or Spiritual Courts, after sentence, will not be granted, unless it appear upon the *face* of the proceedings, that they had no jurisdiction. 3 T. R. 5. 4 T. R. 397; and Doug. 378.

(*x*) Salk. 31.

(*y*) 2 Strange, 968. 2 Barnard. 419.

(*z*) 4 Burr. 1944.

Where there is any thing out of the usual course (whether by the contract for wages being under seal, or containing special covenants) the Court of K. B. will issue a prohibition, if the application be made before sentence, and the Court of Admiralty refuse to receive the plea.

motion for a prohibition was founded upon an allegation, that the contract of the seamen was of a special nature, and was, moreover, made on land, in this country, and sealed and delivered by the parties; and that the defendant in the Court of Admiralty had offered to prove such specialty, and had alleged such deed, but that the Judge of that Court had altogether refused to receive the plea and allegation. Upon these grounds the prohibition was accordingly granted by the Court of King's Bench. Lord HARDWICKE, Chief Justice, said, that as the Admiralty Court proceeds in suits for mariners' wages upon contracts made at land, which cannot be the proper cognizance of the maritime jurisdiction, merely by indulgence, a prohibition would always be granted where the contract differed from the common and usual contracts between masters of ships and seamen about wages, by reason of some special terms contained in it; and that in this agreement there seemed to be some special covenants, as, for example, I. That if the mariners should enter into any of his Majesty's ships of war, they should forfeit their wages; which was directly contrary to a clause in the late act. And, II. That where the agreement was by writing, signed and sealed, there also a prohibition should go, which was likewise the present case. (*a*) In Howe *v.* Napier, the prohibition was likewise granted; and Lord Mansfield observed, that this case differed from the ordinary contract for seamen's wages in other particulars besides the seal.

As the agreement under which the seamen are hired always remains in the possession of the master or owners, and the seamen might be delayed, if not defeated, in their claim for wages, if it were necessary for them to produce it, it is expressly directed by the 2 Geo. II. c. 36. and the 31 Geo. III. c. 39. that when it becomes necessary to produce the contract in court, it shall be so produced by the master or owners of the ship, and that no seaman shall fail in any

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(*a*) Abbott, 489.

suit or process for the recovery of wages for want of the production of it. In the usual action in the Admiralty by seamen for their wages, the suit is rested upon the service, and not upon the hiring; and, therefore, the contract upon which such seamen are hired, whatever it may be, is not necessarily produced in the Court of Admiralty. And this, indeed, is the reason why, if a master or owner intend to avail himself of the plea of a deed or special agreement, he must plead it in bar in the court of Admiralty; in which case the court must admit such plea, or application may be made to the court of King's Bench for a prohibition. But in Buck *v.* Atwood,(*b*) where the owners pleaded such a deed, but the plaintiff replied that the deed was obtained by fraud and circumvention, and the court of Admiralty, declaring it to have been so obtained, gave sentence for the plaintiff to recover his wages, the Court of King's Bench refused a prohibition. The court said, in substance, that the object of the deed was confined to certain circumstances under which the seamen were to forfeit their wages, but could not enable them to sue for their wages at law: the deed, therefore, was only an incident, and, as such, might be collaterally taken as part of the proceedings in the Court of Admiralty.

Where a deed has been obtained by fraud, the Court of K.B. will not prohibit a suit for wages in the Admiralty; nor will they prohibit, where the deed does not immediately relate to wages.

It has been before stated, that seamen's wages take precedence of all other demands. But actions for such wages must be commenced within six years after the cause of such action shall accrue, unless the party entitled to sue shall at that time be within the age of twenty-one years, a *feme covert*, *non compos mentis*, or imprisoned, or unless such party, or the party sued, shall be at that time beyond the seas; in which cases the suit may be brought within *six* years after the party suing shall be of full age, discovert, of sane memory, or at large; or either the party suing, or the party sued, shall return from beyond the sea. (*c*) If the action be brought in a court of com-

Limitation of actions for seamen's wages.

(*b*) 2 Stra. 781.

(*c*) 4 Ann. c. 16. s. 17, 18, and 19.

mon law against the master or owners, it is subject to the same limitation. But if the agreement be by deed, the demand may be made at any period within twenty years instead of six. The form of action is by assumpsit, or action of debt, except in the case of a deed, where the action must be by debt or covenant. The plaintiff may apply to a Judge of the court for an order for the defendant to produce the articles to the plaintiff's attorney.

Summary provisions by the 59 G. III. c. 58, for the more expeditious recovery of seamen's wages by the adjudication of a Justice of the Peace; provided such wages do not exceed the sum of twenty pounds.

By the 59 Geo. III. c. 58. an act passed in the last Session of parliament, considerable facilities are afforded to mariners for the recovery of their wages. This act recites, that seamen and mariners employed in the merchant service, and in the coasting trade of this kingdom, had been exposed to great difficulties, expence, and inconvenience in suing for and obtaining payment of their wages, in cases of dispute with the masters or owners of vessels in which they had served. The act then recites, that it was expedient that greater facility should be given for the recovery of such wages. It then empowers Justices of Peace, on the complaint of seamen, to hear and settle disputes about wages, not exceeding twenty pounds. And if the owners or masters shall refuse to comply with the determination of the Justices, the amount of wages which they shall adjudge to be due, may be levied by distress upon their goods and chattels. And the determination of the Justice or Justices is to be final, unless an appeal be interposed by either party to the High Court of Admiralty, within the space of seven days after the order made. The act provides, that if seamen or others are dissatisfied with the order of the magistrate, they must give notice of their intention to appeal to the High Court of Admiralty, within forty-eight hours after the order made. A monition is to be taken out against the adverse party within thirty days; and good and sufficient bail, in double the amount of the wages claimed, must be given before a Commissioner of Prizes, or the Justice who shall have pronounced the order. This bail is to be certified, according to a form given in the schedule, and transmitted without delay to the High Court of Admiralty. Seamen, however, are not to be precluded from the benefit of any agreements entered into before the passing of the act; nor of any other remedy to which they may now resort. This act will be found in the Appendix.

CHAPTER VI.

OF PILOTS.

THE conduct of ships into ports and havens being sometimes the most difficult and dangerous part of the whole voyage, and the depth and shallows of inland rivers, and the bounds and capacity of ports, being necessarily less known by sailors than by those who live in the vicinity, it has been the practice of the maritime law from the earliest times, not only to encourage, but to require the masters of vessels to avail themselves of the service of pilots; that is to say, of persons taken on board at a particular place for the purpose of conducting ships through rivers, roads, and channels, or from, or into ports.

Laws of Oleron.

Thus, by the laws of Oleron the pilot was bound to bring the ship into a safe harbour; and if the vessel or cargo perished, or were injured whilst under the pilot's charge, the pilot was responsible. If the fault of the pilot were notoriously gross, the crew, by the same law, might lead him to the hatches, and strike off his head. (*a*)

Masters of ships in foreign trade must take a pilot in their outward and homeward voyage.

The law of England, adopting the reason of the law merchant, though not the barbarous severity of the laws of Oleron, requires, as a general rule, the master of a ship engaged in foreign trade to take a pilot on board, both homeward and outward, wherever such pilots are established. (*b*) The several statutes mentioned in the note below (*c*) constitute the system of pilotage as at present

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(*a*) Leg. Oler. cap. 23. Molloy, B. 2. C. 9. 1. and 2.

(*b*) Law *v.* Hollingworth, 7 T. R. 160.

(*c*) 3 Geo. I. c. 13. 7 Geo. I. c. 21. 5 Geo. II. c. 20, 21. 43 Geo. III. c. 152. 47 Geo. III. s. 2. c. 71. 48 Geo. III. c. 104. 52 Geo. III. c. 39. and 53 Geo. III. c. 140.

Pilotage consolidation acts.

required and acted upon by the law of England and practice of merchants. The two last of these statutes, the 52 Geo. III. c. 39., and the 53 Geo. III. c. 140., which not only consolidate the former statutes respecting pilotage up and down the Rivers Thames and Medway, but contain enactments applying to other ports of the kingdom generally, will be found in the Appendix. It is more matter of general regulation than of law; and, being the daily course of business amongst masters, belongs rather to their books of practical navigation.

Masters, if owners or part owners, may pilot their own ships.

But the reason of the law in thus requiring masters to take pilots being to secure owners against the too common confidence of masters in themselves, the law now dispenses with the rule in all cases where the reason does not apply; that is, where the master is owner, and conducts his own ship. Accordingly, a clause is introduced in the 52 Geo. III. c. 39., by which such persons, namely, masters and part owners, are allowed to conduct their own ships up or down the Rivers Thames or Medway, or into, or out of, any port or place within the jurisdiction of the cinque ports. This clause was introduced after the judgment of the King's Bench in the case of Kimber *v.* Blanchard, (*d*) in which the court determined, that under the acts preceding the 52 Geo. III. c. 39. a master who shall conduct his own ship was within the penalties of the pilot acts. (*e*)

Upon the same principle in Rex *v.* Lambe, and Rex *v.* Neale, a doubt having existed amongst masters of ships, though not adopted by the court in the trial of these cases, whether a master could under any circumstance move a vessel from her original moorings, a clause was introduced in the twenty-second section of the 52 Geo. III., by which it is provided, "That nothing in this act

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(*d*) Kimber *v.* Blanchard, 2 Black. 690. 5 Burr. 2602.

(*e*) Rex *v.* Lambe, 8 T. R. K. B. 76. Rex *v.* Neale, 8 T. R. K. B. 241.

contained shall be construed to prevent any ship or vessel which shall be brought into any port or ports in *England* by any pilot duly licensed, from being afterwards removed in such port or ports by the master or mate, or other person belonging to any such ship or vessel, and having the command thereof, or if in ballast, by any other person or persons appointed by any owner, or the master, or any agent of the owner, for the purpose of entering into or going out of any dock, or for changing the moorings of such ship or vessel."

Rates of pilotage.

The rates of pilotage are in almost all cases settled by the 52 Geo. III. c. 39.; but, where the statute is silent, are to be regulated by the usage of the port. The rates to be paid for pilotage, within the Rivers Thames and Medway, and in the channels leading thereto, to pilots licensed by the corporation of the Trinity-house, are enumerated in a table annexed to the statute. And in the same manner in a second table, the rates to be paid for pilotage to the cinque port pilots. (*f*) But these rates seem only to apply to the Trinity-house pilots. (*g*)

Of the pilotage of foreign and British ships.

By the fifty-seventh and fifty-eighth sections of the same act, if the ship be not a foreign ship, the pilotage may be recovered of the owners or masters, or from the consignees or agents; and may be levied in like manner as penalties are directed to be recovered, demand being made in writing at least fourteen days before such levy. If it be a foreign vessel, the sum due for pilotage may be recovered of the consignees or agents of such vessels, who shall have paid or engaged to pay any charge whatever in relation to such ship or vessel. Such sum due for pilotage to be paid upon proof thereon being made, within fourteen days after such pilotage shall have been performed, "on the oath of such pilot before any justice of the peace, that the same

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(*f*) 52 Geo. III. c. 39. s. 3. and 9. 227.

(*g*) Nelson, Main. 6 Rob. A. R.

has not been paid by the captain of such ship or vessel. If payment thereof shall be demanded from any such consignee or consignees *within twenty-one* days thereafter; such sums are recoverable in like manner, as any penalty under the sum of 20*l.* may be recovered by virtue of the act; and such consignees or agents of *foreign* ships or vessels are hereby authorised and empowered to retain in their hands respectively out of any monies which they may have received or shall thereafter receive for or on account of such *foreign* ship or vessel, or the owner or owners thereof, so much as shall be sufficient to pay and discharge such pilotage, and any expences attending the same." By the fifty-ninth section of the act, masters of vessels which shall be piloted by any other than a duly licensed pilot (within the limits of pilotage,) are liable to forfeit double the amount of the sum which would have been demandable for the pilotage of the vessel; and also an additional penalty of 5*l.* for every fifty tons' burthen of such vessel, if the corporation of the Trinity-house shall consent thereto, in cases where their pilots are concerned; or the lord warden of the cinque ports, or his lieutenant, where the cinque port pilots are concerned, such consent to be certified in writing. (*h*)

Penalty for not taking a licensed pilot.

But masters are not liable to any penalty for acting as pilots of their respective vessels (not anchoring within the limits of any port or place for which pilots are or shall be appointed,) in passing up and down the English channel; or elsewhere, in passing by any part of the coast of England, in the course of any voyage; or within the limits of the port to which such ship belongs, (such port not being theretofore regulated, in respect to pilotage, by any charter or act of parliament,) and may employ any

Exceptions.

Any person may be employed as a pilot to assist ships in distress.

(*h*) *Semble*—A forfeiture for refusing to receive a pilot on board is not incurred unless the pilot produces his licence on demanding admission. Usher *v.* Lyon, 2 Price 118. As to calculating the penalties imposed by the 52 Geo. III. c. 39. s. 11, see Mackie *v.* Landon, 6 Taunt. 256; and 1 Marsh, 585.

person as pilot, or act themselves as such, in cases when no duly qualified pilot offers; and no person shall, in any case, be liable to a penalty when employed as pilot in assisting ships in distress.

Particular exemptions from taking a pilot.

Besides the above exemption from the necessity of taking a pilot under this act, namely, that of a master conducting his own ship, the second and twenty-ninth sections exempt, "as well all colliers, as also all ships and vessels trading to *Norway*, to the *Cattegat*, and to the *Baltic*, and likewise round the *North Cape*, and into the *White Sea*, and all constant traders inwards from the ports between *Boulogne* inclusive, and the *Baltic*, such ships and vessels having British registers, and coming up the *North Channel* by *Orfordness*, but not otherwise; and likewise, all coasting vessels, and all *Irish* traders, using the navigation of the River *Thames* as coasters; and ships not exceeding the burthen of *sixty* tons having *British* registers."

Coasters and ships not exceeding the burthen of 60 tons—if registered.

In Usher *v.* Lyon, (*i*) it was decided, that coasting vessels were not compellable to take pilots on board on entering rivers within the limits of a jurisdiction having authority to appoint and license pilots; and that the exemption in the 52 Geo. III. c. 39. was not confined to coasters using the navigation of the Thames alone.

Limitation of the responsibility of owners and masters, when pilots are on board, by 52 Geo. III. c. 39.

By the twenty-sixth section, it is enacted, "That owners and masters shall not be responsible for loss or damage, nor shall owners or consignees be prevented from recovering upon any contract of insurance, or other contract relating to any ship or vessel, or any cargo on board the same, by reason of no pilot having been on board such ship or vessel, unless it be proved the want of a pilot shall have arisen from a refusal to take one, or from the wilful neglect of the master in not heaving-to, or using all prac-

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(*i*) 2 Price, 118; and *ante*, page 473.

ticable means to take on board any pilot who shall offer." And by the thirtieth section it is provided, "That no owner or master of any ship or vessel shall be answerable for any loss or damage, nor shall any owner or owners of any ship or vessel, or consignee of goods, be prevented from recovering any loss or damage upon any contract of insurance of the same, or upon any other contract relating to any ship or vessel, or any cargo on board the same, for or by reason or means of any neglect, default, incompetency, or incapacity of any pilot taken on board of any such ship or vessel under or in pursuance of any of the provisions of this act." By two other sections, (*k*) no owner of a ship or vessel shall be liable for any loss or damage beyond the value of such ship or vessel, and her appurtenances, and the freight due for the voyage wherein such loss or damage may arise. And "nothing in this act contained shall be construed to extend to deprive any persons of any remedy by civil action against pilots or other persons, which they might have had, if this act had not passed." And it has been determined, that the clause in this act, exempting masters from liability for damage occasioned by the pilot's misconduct, is not confined to damage to the piloted ship and cargo. (*l*)

Amended Pilot Act, 53 Geo. III. c. 140.

The object of the 53 Geo. III. c. 140. which is the last pilotage act, is substantially expressed by its title, which is, "An act for the more effectual regulation of pilots, and of the pilotage of ships and vessels on the coast of England, and for the regulation of boatmen employed in supplying vessels with pilots, licensed under the said act, so far as relates to the coast of Kent, within the limits of the Cinque Ports."

Boatmen to be licensed by

In pursuance, therefore, of this object, it is enacted by

(*k*) Twenty-seventh and thirty-first.

(*l*) Ritchie *v.* Bousfield, 7 Taunt. 309; and Bennet *v.* Moita, 7 Taunt. 258; and see this latter case, *post*, p. 481.

the Lord Warden of the Cinque Ports.

the first clause, that one hundred and forty boatmen shall be licensed by the Lord Warden of the Cinque Ports, or by his lieutenant, or by the deputy lieutenant governor of Dover Castle, or such other persons as he shall specially authorize for that purpose, within the jurisdiction of the Cinque Ports, for the purpose of assisting ships in distress, and conducting them into, and out of, the harbours of Dover, Ramsgate, Margate, and Folkestone, and putting licensed Cinque Port pilots on board of ships and vessels coming from the westward, and bound up the River of Thames, or Medway; and fifty of such boatmen shall constantly reside at Dover, fifty at Deal, twenty at Ramsgate, and twenty at Margate; and all such boatmen shall be respectively required by such licences to reside at the respective places to be specified, and shall, upon quitting their places of residence, or neglecting to use or act under the same for the space of two months, unless prevented by illness, forfeit such licences; and every such boatmen, before licence be granted, shall be examined as to his knowledge of the coast, and ability to conduct ships and vessels into the Downs and the harbours of Dover, Ramsgate, Margate, and Folkestone, by the commissioners of the lord warden of the Cinque Ports for settling salvage, and the other commissioners appointed by this act, at the respective places where such boatmen shall apply to be licensed, at a meeting to be held for the purposes of this act, upon whose certificate the lord warden or his lieutenant, or the deputy lieutenant governor of Dover Castle, or such other person authorised as aforesaid, shall be empowered to grant such licences; and if the number of persons so approved and qualified to act as such licensed boatmen shall exceed the number prescribed by this act, the names of the persons so approved and qualified shall be entered in a book, to be provided for that purpose, together with the times of their approval and examination, in order that they may regularly succeed, by rotation, to the vacancies that may from time to time occur by death or forfeiture of licences or otherwise, in order that the

To be examined as to their competency by Commissioners duly appointed.

number of licensed boatmen may at all times be complete. And by the tenth section it is enacted, that no more than two licensed boatmen shall be allowed to go in each boat; and whenever any such licensed boatmen shall be cruising, without any licensed Cinque Port pilot, and fall in with any ship or vessel requiring a licensed Cinque Port pilot, one of the licensed boatmen shall be left on board the ship or vessel wanting such pilot, as a guarantee for a proper pilot being brought or sent off the shore to such ship or vessel; and the boatman so left shall not be entitled to any sum of money or payment for being so left, or being on board. And by the thirteenth and fourteenth sections it is enacted, that every licensed boatman who shall, on being applied to by any licensed Cinque Port pilot, to take him off to any ship or vessel, refuse so to do, unless prevented by illness, shall, upon due proof thereof, in the place where he shall be licensed, forfeit his licence, and any sum not exceeding twenty pounds for each offence. And if any pilot, whose turn it shall be to go off on duty, shall refuse or neglect so to do, on being applied to by any licensed boatman, such pilot shall lose his turn, and the ship or vessel shall be piloted by any duly licensed pilot who shall first get on board, but which shall not be taken for the turn of duty of such last-mentioned pilot.

No more than two licensed boatmen to go in each boat.

Penalty on a boatman refusing to take a licensed pilot on board a ship.

It appears scarcely necessary to add, except that a principal case was once determined upon it, that a British pilot cannot sustain a suit for wages for navigating a foreign ship to an enemy's port. In the Benjamin Franklin,(*m*) the case had some singularity, as this objection was taken by the Judge, instead of being suggested in the defence. It was a suit brought for wages on the part of J. Gillman, a British pilot, for conducting a ship, being an American vessel, from the Downs to Flushing. The demand was resisted, on a suggestion of want of skill in

British pilot cannot sustain a suit for wages for navigating a foreign ship into an enemy's port.

The Benjamin Franklin.

(*m*) 6 Robinson, 350.

running the vessel on a sand, by which considerable damage was sustained. But Sir William Scott stopped the case upon its statement, on the ground that a suit could not be maintained on the part of a British subject for services performed in aiding the commerce and importation of the enemy. Would not such services be a contribution of their skill and experience to assist and promote the navigation of the enemy's ports? That pilots may often engage in such services will be of little signification. They may be disposed to undervalue the obligation of abstaining from all traffic with the enemy, and to risk their own personal safety for the sake of gain. But a court of justice will not so consider it, nor give any support to demands arising out of a course of navigation which must be pronounced to be illegal to a British subject.

Where a ship is engaged in any trade or enterprize contrary to the law of nations, the PILOT, as well as the seamen, forfeit all claim to wages.

In the Leander, Murray, (*n*) the court carried this principle still further, Sir William Scott laying it down as a general rule, that not only the pilot, but all the seamen, must lose any claim to wages, where the ship was engaged in any trade or enterprize contrary to the law of nations. As this case bears upon a traffic too common at the present period, it may not be without utility to relate it more fully. It was a suit for wages, instituted on behalf of James Minus, who was shipped at New York, in January, 1806, by Lewis, the former master, as a seaman on board this vessel, at twenty-six dollars per month, of which he received a month's pay in advance. The ship was one of those employed in the expedition against Spanish America, under General Miranda; and upon her arrival at a port, in the island of St. Domingo, which was within a month from the time of the shipment of Minus, several of the crew were permitted to volunteer their services in the military department of the expedition, and Minus then entered as an artillery man. It was agreed between the master and those of the crew who volun-

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(*n*) Edwards, A. R. p. 35.

The Leander, Murray.

teered, that from that period they were to cease to be considered as seamen, and were to receive a quarter dollar per day, and a gratuity of prize-money, and land in case the expedition succeeded; but the pay and prize-money were to depend on that event. The expedition having failed, Captain Lewis and several of the crew left the ship, and she afterwards proceeded to Trinidad, and was there sold to the present owners. The remainder of the crew were paid at the time of the sale, as far as the funds of the former owners would extend, and gave full discharges for the whole amount of their wages. But no demand was made by Minus, or any of those who had volunteered in the military department, as it was understood that their claim to remuneration was extinguished by the failure of the expedition. Minus, sometime after, claimed wages of General Miranda; but on being informed that he was not entitled to any, he commenced these proceedings against the ship. Sir WILLIAM SCOTT, in his judgment, said, This question arises on the admission of a defensive allegation offered by the owners of this vessel, in answer to a petition for wages. It appears that, at the time this person entered into the service of the ship at New York, as a mariner, she was the property of American owners, but that the vessel has been since transferred to British subjects. Now, although it is a settled principle for the protection of mariners generally, that wages form an indelible and perpetual lien on the ship, and follow her wherever she goes, it is easy to see the great inconvenience that might arise from carrying this principle to its full extent in the case of foreign purchases. Where an English ship is purchased by English merchants, the purchasers have an opportunity of becoming acquainted with all the circumstances of the antecedent history of the vessel; but in making purchases of this description, it is scarcely possible for them to inform themselves of all the transactions, regular or irregular, in which she may have been engaged. And I should, therefore, be extremely unwilling, without further consider-

The Leander, Murray.

ation and examination of the subject, to lay down universally, that it is a principle which this court is bound to act upon under all circumstances with respect to ships purchased of foreigners by British subjects, or by foreigners of British subjects. The allegation now offered states many circumstances which are dissembled in the summary petition. It appears that no less than one hundred and eighty men were engaged on board the vessel, and that the agreement was for a voyage from New York to St. Domingo, and back again to America; whether to North or South America is not stated. Now this is a fact that savours very little of a commercial voyage; they could not have been engaged for the mere purposes of navigation, as it is shewn that fifteen men were amply sufficient for purposes of that species; and from this circumstance, as well as from general notoriety in the port from which the ship sailed, it was easy to surmise that the object of the voyage was not commercial. The fact is, that on coming in sight of St. Domingo, the true nature of the voyage was explained to all persons on board; they were told that the ship was destined to form a part of General Miranda's expedition against South America, and that all those who chose to enlist would be entitled to prize-money, and to an allotment of lands. This proposal was accepted by the claimant, who entered into a new agreement to serve as a soldier in the expedition; so that there is an end of the former contract, if that were a contract purely maritime. I do not think it material to enquire whether he was to serve as a soldier or a sailor, *because the expedition itself appears to a court of justice merely as an unauthorized, and consequently an illegal adventure, not sanctioned by the government of any country, and such as will not support a demand for wages earned in the progress of it.* What private connivance or encouragement might have been given by any particular state (as has been suggested in argument) does not appear. *No public commission or formal authorization of any kind is pretended; and without something of that sort is alleged or* *shewn, it is the mere unlicensed enterprise of an individual.* To what country the claimant belongs is not stated. *As a British subject he could not regularly embark in such an undertaking under this military commander without the authority of his government;* and if he be an American, his own government had prohibited such an engagement by public proclamation. If he is a subject of some other country, the general objection holds, that the expedition itself was the unauthorized act of a private person, out of which no legal claims can arise. For that part of the voyage which was legal, it is admitted that the wages had been paid in advance; and I am clear, therefore, that if this allegation is proved, it is of a nature to bar the claim which is set up, especially against the present holders of the vessel, who come in as innocent successors to the former owners, and know nothing of her antecedent history.

The Leander, Murray.

Where a pilot is on board, and in the actual government of the ship, the master or owners are not liable for any damage or loss occasioned to the ship, cargo, or to any other vessel, unless such damage or loss be occasioned by their own default, or that of the crew.

Where a pilot is on board, under the pilot acts, and it would seem, upon principle, where a pilot is on board, in any place, or upon any occasion, where pilotage is made necessary by the legislature, the master is not liable for damage occasioned in running down another ship, unless, indeed, express evidence be given, that the master superseded the pilot in the management of the ship, and that the fault was occasioned by himself or crew. In Bennet *v.* Moita, (*o*) the ship Ranger had taken a pilot on board, off Gravesend, to navigate her to her moorings, near Rotherhithe; in the course of proceeding to this place she was run foul of by the defendant's brig the Carvalto, the Carvalto at that time having an old experienced pilot on board. The counsel for the defendant objected, that the action could not be maintained, the Carvalto having a pilot on board, by whom the authority of the master was divested. He supported this objection upon the 52 Geo. III. c. 39. s. 30.

(*o*) Holt, N. P. 359; and 7 Taunt. 258.—See likewise Boucher *v.* Noidstrom, 1 Taunt. 568. Nicholson *v.* Mounsey, 16 East. 384.

Bennet *v.* Moita.

(before cited) by which it is provided, "That no master or owner of any ship or vessel shall be answerable for any loss or damage; nor shall any owner or owners of any ship or vessel, or consignee of goods, be prevented from recovering any loss or damage upon any contract of insurance of the same, or upon any other contract relating to any other ship or vessel, or any cargo on board of the same, for or by reason or means of any neglect, default, incompetency, or incapacity of any pilot taken on board of any such ship or vessel under or in pursuance of this act."

It was contended on the other side—1. That the act did not extend to ships in the River Thames. The act was entitled "an act for the more effectual regulation of pilots and pilotage of ships and vessels on the coast of England." Now, the term coast was properly confined to the shores of the sea. Had rivers been intended, would not the act have used the characteristic word *banks?* 2. That the statute did not prevent an action being brought against the captain; and that, at any rate, to exculpate the captain, it should be shewn that the accident arose from the negligence or incapacity of the pilot. But Gibbs, C. J. determined both points in favour of the defendant. He said, that the act manifestly extended to the River Thames; and the pilot being on board, and the authority of the master thereby divested, the latter ceased to be responsible when he ceased to act.

Carruthers *v.* Sydebotham.

So, likewise, in Carruthers *v.* Sydebotham, (*p*) the Court of King's Bench decided, that where the captain of a vessel took on board a pilot by virtue of the Liverpool Pilot Act, (which incorporated the general provisions of the 52 Geo. III. c. 39.) and a loss happened, occasioned by the neglect of such pilot, whilst the ship was under his conduct, the assured were not prevented

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(*p*) 4 Maule and Selw. 77.

from recovering an average loss upon a damage by stranding.

In Carruthers *v.* Sydebotham the judgment of the Court of King's Bench was founded upon the principle, that the master shall not be answerable for the act of the pilot whom he does not appoint; whom he is bound by law to receive into his vessel; and who, when on board, displaces his authority, and supersedes him in the temporary government of the ship. It seems, indeed, unreasonable to make a master responsible where he has no controul. It was upon this principle that the decision in Nicholson *v.* Mounsey, *supra*, proceeded. But, unquestionably, the captain would be answerable for any individual personal misconduct in himself and crew. It must be observed, however, that Carruthers *v.* Sydebotham is somewhat at variance with a case subsequently decided in the Court of Exchequer. In the Attorney General *v.* Case, (*q*) that court decided, that the owners of a merchant vessel running foul of, and damaging a king's ship lying in the River Mersey, by the misconduct of the persons on board, were liable in an information for damages, in the nature of an action on the case, although she had on board, at the time of the accident, a pilot duly licensed. This case likewise turned on the Liverpool pilot act, and not on the 52 Geo. III. c. 39.; and the distinction which the court took was, that the Liverpool pilot act was not of itself (nor by reference to the 52 Geo. III. c. 39.) imperative, compulsory, or *penal* on the captain, to take a pilot on board whilst his vessel was lying at anchor; but merely subjected him to the payment of the pilot's regulated allowance on refusal. In this case also the court, after great deliberation, determined, that the thirtieth section of the 52 Geo. III. c. 39. (which, they said, was commonly, but *improperly*, termed the general pilot act,) discharging masters and owners of vessels having pilots on board from responsi-

Attorney General *v.* Case.

Construction of the Liverpool Pilot Act by the Court of Exchequer.

(*q*) 3 Price, 302.

bility for damages occasioned by the neglect of the pilot, did not apply to vessels having on board pilots appointed for *other places* than those *expressly named* in the preamble and provisions of that act. They thought, however, where that act did apply, that the crown was equally bound with the subject. Indeed, the 52 Geo. III. has always been considered as an act in relief of the general responsibility of the master and owners of ships, having pilots on board in pursuance of its provisions. Therefore, in Ritchie *v.* Bousfield, before cited, (*r*) the Court of C. P. decided, that the exemption of the master, &c. from responsibility by the thirtieth section of that act was not confined to loss or damage happening to the piloted ship and cargo; but extended to damage done by that ship to others.

(*r*) 7 Taunt. 309; and see *ante*, page 475.

CHAPTER VII.

OF CONVOY.

SHIPS and their cargo being a species of property of no less importance to nations than to their individual proprietors, and being often of a character, the capture of which would add to the hostile means and power of the adversary, the legislature has imposed restraint during a period of war, the object of which is to prevent them from falling into the hands of the enemy.

Of the reason of the convoy acts.

With this purpose the law requires all captains and masters, unless in certain excepted cases, to sail with convoy. Accordingly, at the commencement of every war, it is usual to pass an act of parliament, prescribing and regulating the stations of convoy, and the duties of captains to sail with them; but which act necessarily expires with the war which gave occasion to it. The last of these acts was the 43 Geo. III. c. 57, which expired upon the conclusion of the late peace; but the provisions of this statute are so reasonable, and so necessarily applicable to all wars, that, as they must be re-enacted fundamentally upon any future commencement of hostilities, they may be regarded as constituting the law of convoy in a period of war; and under this view they fall within the present division of our subject.

With a difference only in the name and date of the act, according to any future occasion, the following principles and cases will for the most part apply to any subsequent act of convoy.

By the 43 Geo. III. c. 57., the last convoy act as above said, it was enacted, "That it shall not be lawful for any

Of the provisions of the late convoy

act of the 43 Geo. III. c. 57.

ship belonging to his majesty's subjects, (except as therein after provided,) to depart from any port or place whatever, unless under such convoy as may be appointed for that purpose. And the master is required to use his utmost endeavours to continue with the convoy during the whole voyage, or such part thereof as the convoy shall be directed to accompany the ship, and not to separate therefrom without leave of the commander, under very heavy pecuniary penalties. And in case any ship shall depart without convoy, contrary to the act, or wilfully separate therefrom, all insurances on the ship, cargo, or freight, belonging to the master, or to any other person who shall have *directed or been privy* to such departure or separation, are made null and void. And the officers of the customs in Great Britain and Ireland are required not to allow any ship, which ought to sail with convoy, to clear outwards from any place in the *United Kingdom to foreign parts*, until the master shall have given bond with one surety, with condition that the ship shall not depart without convoy, contrary to the directions of the act, nor afterwards desert or wilfully separate therefrom. But the regulations of this act do not extend to any ship that is not required to be registered; nor to any ship having licence to depart without convoy, from the Lord High Admiral, or three of the Commissioners of the Admiralty, or such person as shall be duly authorized for that purpose by him or them; nor to any ship proceeding with due diligence to join convoy from the port of her clearance, in case the convoy be appointed to sail from some other place, except as to the beforementioned bond to be given upon clearance; nor to any ship bound from any place in the United Kingdom to any other place within the same; nor to any ship belonging to, or in the employ of, the *East India* Company, or the *Hudson's Bay* Company; nor to any ship or vessel departing without convoy from any *foreign port or place*, in case there shall not be any convoy appointed for such ships or vessels, nor any person at such foreign port or place authorized to appoint convoys for such ships or

Exceptions from the convoy act.

vessels, or to grant licences to such ships or vessels to depart without convoy.

Exceptions from the convoy act.

It is also provided, that a ship employed in the Newfoundland fishery, being wholly laden with fish or other produce of that fishery, or with articles of the growth or produce of the island of Newfoundland, or the coast of Labrador, may depart from any place in that island, or on that coast, without convoy or licence; except from the port of St. John's, during the time any admiral, or person authorised to grant licences shall be stationed or resident at that port.

Summary of the convoy act.

Under these provisions, therefore, the general law of convoy, in any period of hostilities, may be substantially stated as follows:—Every vessel is required, during such war: *first*, Not to depart from port unless under such convoy as may be appointed. *Secondly*, To continue with the convoy during the whole voyage, or such part of it as the convoy shall be directed to accompany the ship.—*Thirdly*, All insurances, whether on ship, cargo, or freight, are avoided, on the event of a *voluntary* breach of these laws. *Fourthly*, Officers of the customs are required to detain any ship, which ought to sail with convoy, until the master shall have given a bond, with one surety, to comply with the act.

Exception from the convoy act.

But the regulations of the act do not extend, *first*, To any ship that is not required to be registered. *Secondly*, Nor to any ship having licence to depart without convoy. *Thirdly*, Nor to any ship proceeding with due diligence to join convoy from the port of her clearance, in case of the convoy being appointed to sail from any other place; the master, however, giving the bond beforementioned. *Fourthly*, Nor to any ship bound from any place in the United Kingdoms to any place within the same. *Fifthly*, Nor to any ship belonging to the East India or Hudson's Bay Companies. *Sixthly*, Nor to any ship departing without convoy from any foreign port or place, in case there should not be any convoy appointed for such ship; nor any person at such foreign port authorised to appoint a convoy. Nor, *lastly*, To any ship employed in the Newfoundland fishery.(*a*)

The sailing with convoy must be a sailing with convoy appointed for the voyage.

The sailing with convoy required by this act is a sailing with convoy for the voyage; and it is not sufficient to sail with a convoy appointed for another voyage, though it may be bound upon the same course for great part of the way; and a ship cannot legally sail from port to port without convoy, unless she is bound from port to port; and if a convoy has sailed, a ship cannot legally endeavour to overtake it.(*b*) But the statute 43 Geo. III. c. 57., does not avoid policies on ships sailing without convoy, unless the party interested in the insurance was privy to or instrumental in the sailing without convoy.(*c*) From the two last cases it appears, that the master of the trading vessels should not omit to obtain the sailing instructions and orders delivered out by the commander of the convoy. In Anderson *v.* Pitcher, Lord Eldon observes, "The value of a convoy appointed by government arises from its taking the ships under controul, as well as under protection. But that controul does not commence until sailing instructions have been obtained; nor can it be enforced otherwise than by their means. Without (*sailing instructions*,) the ship does not stand in that relation, or under those circumstances, in which she can take the full benefit of the government convoy. If the fleet be dispersed by a storm, how is she to learn the place of her rendezvous? If it be attacked by the enemy, how is she to obey signals? In short, what communication can the protected have with the protecting force?"

The master of a vessel is bound to obtain the sailing instructions delivered out by the commander of the convoy.

(*a*) Vide 43 Geo. III. c. 57.

(*b*) Cohen *v.* Hinckley, 1 Taunt. 249.

(*c*) Henderson *v.* Hinde, 1 Taunt. 250, n. Wilson *v.* Foderingham, 1 M. and S. 468.—See likewise Webb *v.* Thompson, 1 Bos. & Pull. 5. Anderson *v.* Pitcher, 2 Bos & Pull. 164.

But if the master do all in his power to obtain sailing instructions, but is prevented from obtaining them by badness of weather, or if they are refused by the commander of the convoy, he is excused. In such cases he would be excused, although there should be a warranty to sail with convoy. (*d*) The convoy act is a very penal act; and, therefore, to be construed strictly. (*e*)

What is to be understood by a convoy.

The greater proportion of the cases under the last convoy act arose upon the warranty usual in policies of insurance, that the vessel insured should sail with convoy. The convoy to be understood in this warranty must be a vessel appointed under the authority of government; and it has been decided in the case of Hibbert *v.* Pigou, (*f*) that the accidental accompaniment of a ship of war, which may happen to be bound on the same voyage, is not a convoy within the construction of this warranty. But the warranty to sail with convoy is of course to be understood as an engagement to take such convoy at the usual or nearest port where it is to be had. Hence a vessel from London may take up her convoy at the Downs. (*g*) It is likewise sufficient under this warranty if the vessel goes with the convoy, so far only as the convoy shall be going on the same course or voyage; and if the convoy be called off by the admiral or other commanding officer before the conclusion of the voyage, the warranty is satisfied. (*h*)

Excuses for leaving convoy.

The law of course in no case requires a master to do what it is impossible he should do; and, therefore, where the convoy quits him, in the mid-sea, or before he reaches the port, or where the force of the convoy is diminished, and the ship is accompanied by a part only of the squadron,

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(*d*) Vide Abbott, 243.

(*e*) Vide Carstairs *v.* Allnutt, 3 Campb. 497. Wainhouse *v.* Cowie, 4 Taunt. 178. Wake *v.* Atty, *Ibid.* 493. Ingham *v.* Agnew, 15 East. 517.

(*f*) Park, c. 498.

(*g*) Lethulier's case, 2 Salk. 443, and Gordon *v.* Morley, 2 Stra. 1265.

(*h*) D'Eguino *v.* Bewicke, 2 H.B. 551.

or by a single ship only; in all these cases the warranty is satisfied.(*i*) But, so far as depends upon the master, he must not only sail with the convoy, but keep with it; though, upon the principle of necessity above stated, he is excused if separated by tempest, or other inevitable cause and accident.(*k*) It has been before said, that the master should provide himself with the sailing instructions of the commander of the convoy; but the impossibility of doing so, whether arising from the tempestuousness of the weather, or the refusal of the commander of the convoy, is upon the abovementioned principle a sufficient excuse under the warranty in a policy of insurance.(*l*)

The ship must not only sail with convoy, but bonâ fide keep with it.

Where ships are conditionally licensed to sail without convoy, they must strictly adhere to the terms of the condition.

In the ship Providence, Hinckley *v.* Walton,(*m*) the question before the court was, whether the vessel had complied with the conditions of her licence, and by such compliance had entitled herself to sail without convoy. The licence was granted to sail without convoy, provided she should be manned and armed as stated in the representation, upon which the licence was granted. The ship sailed with the number of men and guns stated in the representation, but had put some on shore in the course of her vogage; and had, therefore, less than the complement stipulated when captured. Under these circumstances the court decided, that the condition of the licence had not been complied with; and that the vessel had, therefore, sailed without convoy, contrary to the act.

The two following cases, Ingham *v.* Agnew, and D'Aguilar *v.* Tobin, comprehend so large a portion of the general law of convoy, that we shall give them in some detail.

(*i*) Smith *v.* Readshaw, Park 510. De Garay *v.* Clagget, *Ibid.* Manning *v.* Gist, Marshall, Book I. c. 8. s. 4. Audley *v.* Duff, 2 Bos. & Pull. 111.

(*k*) Lilly *v.* Ewer. Doug. 72.—Jeffrey *v.* Legendra, Carth. 216.—3 Lev. 320.

(*l*) Victorin *v.* Cleeve, 2 Stra. 1250. Veedon *v.* Wilmot, Chief Just. Lee, at Guildhall.

(*m*) 3 Taunt. 131.

Ingham *v.* Agnew.

In Ingham *v.* Agnew,(*n*) the circumstances were as follow:—The plaintiffs having hired the ship Ocean, by charter-party, for a voyage to Messina, Palermo, or Malta, loaded a cargo of goods, in which they were duly interested, on board her at Hull for Palermo, procured the policy in question to be effected, and obtained a licence from the admiralty, dated the 29th of June, 1810, authorizing the ship, (which was therein described as bound on a voyage to *Gibraltar*, without mentioning any other port,) to sail from Hull to Gibraltar without convoy. The sailing instructions to the master for his voyage were given in the following letter: "Hull, 14th July, 1810. Captain Thomas Aubane, on receipt of this you will immediately proceed with the Ocean under your command, from hence to Spithead, where you will make the necessary enquiries about the convoy. If you find there is one appointed for the *Mediterranean* on the point of sailing, you are to take advantage of it; but as you are on no account to wait for it longer than the wind may continue favourable, you must not take instructions until it is actually under weigh, that you may be at full liberty to pursue your voyage singly, should the convoy not sail the moment the wind becomes fair. In that case you will make the best of your way direct to Palermo, without touching either at Gibraltar or any other port; if, however, in passing Gibraltar, you are ordered into the bay by any of the cruizers, in order to join convoy bound upwards, you must comply; but not otherwise; as your great object must be to get to Palermo, your port of destination, in as short a time as possible." The master accordingly sailed with the ship and cargo on the voyage insured, having no goods on board for Gibraltar; but with clearances for Gibraltar, Malta, and Messina. When the ship arrived in the Gut of Gibraltar, the master was compelled by stress of weather to put into that port. The course of the voyage to Palermo and to Gibraltar is the same, until the vessel arrives in the Gut

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(*n*) 15 East. 517.

of Gibraltar. Having staid at Gibraltar ten days, but finding no convoy, and no person there authorized to appoint convoys, or to grant licences, he sailed again for Palermo, and was captured on the way thither. In an action against the underwriters, it was contended that the voyage was legal, because there was a licence to proceed to Gibraltar without convoy; and the further prosecution of the voyage from that place was within the exceptions of the statute: but the court held the voyage to be illegal, the ship not having in fact sailed for Gibraltar, as her licence imported.

D'Aguilar *v.* Tobin.

D'Aguilar *v.* Tobin (*o*) was an action on a policy of insurance upon the ship, the Samuel Cumming, at and from Jamaica, and Trinidad, in the island of Cuba, to any port or ports of her discharge in the United Kingdoms; warranted to sail from Cuba on or before the 1st of August, 1814. Loss by capture. The vessel took in ballast from Jamaica; sailed July 6th for Trinidad de Cuba; arrived the 10th. She sailed again the 1st of August, at six o'clock, P. M. and got out of harbour that night. She took her course for Cape Antonio, at the west end of the island, which it was necessary to make, in order to get into the gulf stream. She called off the Havannah, which is on the north side of the island; but neither dropped anchor, nor entered the harbour. The captain staid there less than an hour, and during that time went in his boat within the Mors castle. She then proceeded through the gulf, in her course to England; and was captured by an American privateer, on the 17th. The vessel had no convoy or licence. There had been a convoy on the 30th of June from Jamaica to England, but she was not ready then. There was likewise a convoy at the latter end of July to England. It was objected that the ship was not authorised to go to Havannah; though it might be contended that she went there to seek convoy;

(*o*) Holt, N. P. 185.

It is no deviation, when a vessel sails, bonâ fide, in quest of convoy, in order to protect herself from capture.

and that the clause in the policy as to the return of premium, if the ship sailed with convoy, did not authorize a deviation in quest of it. But GIBBS, L. C. J. said, "Whatever is necessary for the safety of the ship, provided it be not excluded by the terms of the policy, may be done by the captain; and what is so done is done as agent to the underwriters. A vessel, when insured, may always do whatever it would be expedient to do if uninsured. She may deviate somewhat from the straight line of her track to seek convoy, when it is for the common good and preservation. It may be as justifiable to seek convoy as to avoid an enemy. Therefore, not only does the reduction of the premium, in case she sails with convoy, authorize her to seek it, but she is at liberty to do so for her own security." The defendant's counsel then relied on the first and eighth sections of the convoy act, and contended that the vessel should have waited for convoy. In 1814 Admiral Brown was on the Jamaica station, and had actually appointed convoys; one on the 30th of June, another on the 30th of July. They did not, however, produce any order from the Admiralty which authorized Admiral Brown to grant convoy or licences; but they contended, that it was to be inferred that he had this power, from being nominated to the station, and having actually appointed convoys. But the Lord Chief Justice observed, "Ships sailing from foreign ports are exempted from the restrictions of the convoy act, unless there are persons at those ports authorized by the Admiralty to grant convoy or licences. I cannot infer, from the act of the admiral in appointing a convoy, an authority from the Admiralty to grant one. This act is highly penal, and Jamaica might have been excluded. There is no proof that there was any convoy for *Cuba* at the time. The legislature saw it would be inequitable to oblige vessels to sail with licences or convoy, when no one in foreign ports was authorized to grant them. I think this vessel was not within the prohibition of the convoy act, because it does not appear that, at the time of her sailing, there was any one at Jamaica legally authorized to grant convoy." (*p*)

Though a ship cannot legally sail from port to port without convoy, unless she is bound from port to port; (*q*) nevertheless, a vessel which sails with convoy, and is driven back by weather into her port of clearance, may lawfully sail thence again with her cargo on the voyage, without waiting for the next convoy from the same port, or joining convoy from any other port. (*r*) But every person who ships goods on board a vessel which sails without convoy (when the act of parliament requires convoy to be taken,) does it at his own peril of such ship's having a sufficient licence for the voyage, without which all insurances on his goods are void by the statute 43 Geo. III. c. 57. (*s*) And this, although the owner of the goods supposed and intended that the ship should have a sufficient licence; and although he lived at a distance from the port, and had no concern with the management of the ship, or the obtaining for her the necessary documents. (*t*) It has been likewise held, as we have before seen, that a licence to sail without convoy to a port which a ship must pass on her voyage, is not a sufficient licence to authorize her to run, without licence or convoy, for the residue of her voyage, after she has touched at that port; and that a licence to Gibraltar will not legalize a voyage to Palermo, Messina, and Malta, touching at Gibraltar, and finding there neither licence nor convoy. (*u*).

We have already said, that to vacate a policy of insurance, on the 4th section 43 Geo. III. c. 57. (a clause so highly penal,) it is not enough to shew that the ship sailed

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(*p*) Holt's N. P. 187.

(*q*) Cohen *v.* Hinckley, 1 Taunt. 249.

(*r*) Laing *v.* Glover, 5 Taunt. 49.

(*s*) Wainhouse *v.* Cowie, 4 Taunt. 178.

(*t*) *Id. Ibid.*

(*u*) *Id. Ibid.*; and see Ingham *v.* Agnew, 15 East. 517, and *ante*, page 491.

without convoy, by the *instrumentality* of an *agent* of the assured, unless it be likewise shewn, that the agent had *authority* from his principal for that purpose.(*x*) And, in order to shew that a voyage without convoy from a foreign port is illegal, it is incumbent on the underwriter to prove that there is convoy occasionally appointed from that port; and that there is some one resident there, authorized to grant licences to sail without convoy.(*y*) So, likewise, in another case, Lord Ellenborough held, that, where the law required a ship to sail with convoy, he would presume that the law was obeyed till the contrary was shewn. " This principle (he added) had been settled in Williams *v.* The East India Company, (*z*) and a variety of other cases." (*a*)

(*x*) Carstairs *v.* Allnutt, 3 Campb. 497.

(*y*) Wake *v.* Atty, 4 Taunt. 493.

(*z*) 3 East. 192.

(*a*) Thornton *v.* Lance, 4 Campb. 231.

END OF PART II. AND VOL. I.

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